ANTITRUST LAW

Unit 3: Criminal Price-Fixing Investigations and Prosecutions

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[1] Section 2R1.1 is the only provision of the Sentencing Guidelines that is specific to antitrust offenses, but many other sections of the Guidelines also apply to the sentencing of antitrust criminal violators. You should pull up a copy of the Guidelines and read the other provisions as they come up in the materials.

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The Sherman Act

THE SHERMAN ACT

Section 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 1]

Section 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 2]

Criminal Statute of Limitations

18 U.S.C. § 3282. Offenses not capital

(a) *In General*. Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

(b) *DNA Profile Indictment.* [Omitted]

HISTORY OF SHERMAN ACT CRIMINAL PENALTIES

	1890	1955	1974	1990	2004
Corporations	$5K	$50K	$1 million	$10 million	$100 million
Individuals					
Fines	$5k	$50K	$100K	$350K	$1 million
Imprisonment	1 year	1 year	3 years	3 years	10 years
	Misdemeanor	Misdemeanor	Felony	Felony	Felony

COMPREHENSIVE CRIME CONTROL ACT

ALTERNATIVES FINES PROVISION

18 U.S.C. § 3571. Sentence of fine

[Sections (a)-(c) omitted]

(d) *Alternative Fine Based on Gain or Loss.* If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.. [18 U.S.C. § 3571(d)]

[Section (e) omitted]

Selected Crimes from the Criminal Code

CRIMES

Criminal Code

18 U.S.C. § 2. Principals (aid and abet liability)

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.[1]

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1001. Statements or entries generally (false statements)

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A,

[1] The general solicitation statute, 18 U.S.C. § 2, is violated only if the underlying crime is completed. Liu v. Amerco, 677 F.3d 489, 494 (1st Cir. 2012); United States v. Korab, 893 F.2d 212, 213 (9th Cir.1989).

109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

18 U.S.C. § 1341. Frauds and swindles (mail fraud)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both

18 U.S.C. § 1343. Fraud by wire, radio, or television (wire fraud)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire,

radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—
   (1) in the case of a killing, the punishment provided in sections 1111 and 1112;
   (2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and
   (3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C. § 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the

Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

18 U.S.C. § 1512. Tampering with a witness, victim, or an informant

(a)-(b) [*Omitted*]

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d)-(g) [*Omitted*]

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i)-(k) [*Omitted*]

18 U.S.C. § 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. § 1622. Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

RALPH GROEN,
Defendant.

Criminal No.: 16 CRIM 683

Filed:

Violation: 18 U.S.C. § 1512(c)(2)

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 10/14/16

INFORMATION

The United States of America, acting through its attorneys, charges:

RALPH GROEN with obstruction of justice for concealing and attempting to destroy documentary material relevant to an antitrust investigation and litigation brought by the United States and State of New York. RALPH GROEN attempted to conceal and destroy his company's end-of-month backup tapes containing email data relevant to the litigation and conceal certain documents referencing those backup tapes.

THE DEFENDANT

1. The defendant, RALPH E. GROEN ("GROEN"), is a citizen of the United States and resident of the State of North Carolina.

2. At all times relevant GROEN was employed by Coach USA Inc. ("Coach") as the Vice President and Director of Information Technology ("IT").

3. During his tenure at Coach, GROEN was in charge of Coach's IT policy, infrastructure, and personnel.

BACKGROUND OF THE OFFENSE

4. Coach is an entity organized and existing under the laws of Delaware and with its principal place of business in Paramus, New Jersey. Coach operates hop-on/hop-off bus tours

around the United States, including a line operated in New York City as Gray Line New York Tours Inc. ("Gray Line"). These tours allow passengers to "hop off" a bus at attractions that interest them and "hop on" another bus operated by the same provider in order to resume the tour.

5. In March 2009, Coach, through its subsidiary, Gray Line, entered into the Twin America LLC joint venture with its primary competitor offering hop-on, hop-off bus tours in New York City. On December 11, 2012, the United States and the State of New York filed a civil complaint in the United States District Court for the Southern District of New York, challenging the formation of Twin America LLC as a violation of the antitrust laws of the United States and the State of New York ("Twin America LLC litigation"). On August 21, 2009 and again on February 22, 2013 Coach issued preservation notices to its management, including GROEN, requiring retention and preservation of all documents and electronic data potentially relevant to the Twin America LLC investigation and litigation.

6. On or about March 21, 2013, and June 5, 2013, the United States served discovery demands for documents under the Federal Rules of Civil Procedure in connection with the Twin America LLC litigation.

7. On or about August 13, 2013, and December 13, 2013, Coach produced documents to the United States responsive to the March 21, 2013, and June 5, 2013 discovery demands.

DESCRIPTION OF THE OFFENSE

8. During the period beginning on or about May 2013 and continuing until on or about April 2014, in the Southern District of New York and elsewhere, GROEN corruptly obstructed, influenced, and impeded an official proceeding by concealing and attempting to

destroy relevant and responsive documentary materials and by providing false and misleading statements during the Twin America LLC litigation, an official proceeding, all in violation of 18 U.S.C. § 1512(c)(2). GROEN did so by undertaking the following actions:

Concealment of Backup Tapes

(a) In or about June 2013, GROEN directed one or more of his subordinates to recall, conceal, and destroy several end-of-month backup tapes containing relevant and responsive emails and other electronic records, all of which were only available on the backup tapes;

(b) In or about June 2013, subordinates of GROEN did recall the end-of-month backup tapes containing relevant and responsive emails and other electronic records from an offsite storage facility and concealed them;

(c) As a result of GROEN'S concealment and attempted destruction, the records and documents on the end-of-month backup tapes were not produced to the United States before discovery closed in the Twin America LLC litigation; and

(d) The records and documents on the concealed end-of-month backup tapes were relevant and responsive to United States' discovery demands.

False and Misleading Statements to Outside Counsel

(e) During the period beginning on or about May 2013 and continuing until on or about April 2014, GROEN falsely and misleadingly informed Coach's outside counsel that materials relevant and responsive to the Antitrust Division's discovery demands did not exist.

Concealment of Backup Policy Documents

(f) In or about July 2013, GROEN provided one backup procedure document to Coach's counsel for production in response the United States' discovery demands;

(g) On at least two separate occasions, GROEN concealed other versions of the procedure document and falsely confirmed to Coach's counsel that the one document provided was the only document relevant to the United States' discovery demands; and

(h) As a result of GROEN'S concealment, other relevant and responsive practice and procedure documents were not produced to the United States before discovery closed in the Twin America LLC litigation.

False and Misleading Statements at Deposition

(i) On or about September 12, 2013, GROEN testified as a Federal Rule of Civil Procedure 30(b)(6) deponent for Coach, where he took an oath to testify truthfully; and

(j) During the deposition, GROEN provided false and misleading statements regarding Coach's document retention practices and procedures.

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ALL IN VIOLATION OF TITLE 18 UNITED STATES CODE, SECTION 1512(c)(2).

Dated: September 22, 2016

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UNITED STATES v. MARTHA STEWART
323 F. Supp. 2d 606 (S.D.N.Y. 2004)
(excerpt[1])

CEDARBAUM, District Judge.

. . .

BACKGROUND

Stewart and Bacanovic were indicted on criminal charges arising from Martha Stewart's December 27, 2001 sale of 3,928 shares of stock in ImClone Systems, Inc. ("ImClone"). ImClone is a biotechnology company whose then-chief executive officer, Samuel Waksal, was a friend of Stewart's and a client of Stewart's stockbroker at Merrill Lynch, defendant Bacanovic. On December 25, 2001, ImClone learned that the Food and Drug Administration had rejected the company's application for approval of Erbitux, a cancer-fighting drug. On December 28, the day after Stewart sold her shares, ImClone publicly announced that the Erbitux application had been rejected. Shortly after ImClone's announcement, the Securities and Exchange Commission ("SEC") and the United States Attorney's Office for the Southern District of New York launched investigations into trading in ImClone stock in advance of the announcement to the public of the news about Erbitux.

Each defendant was questioned twice in the course of these investigations. Stewart was interviewed at the office of the United States Attorney on February 4, 2002 and by telephone on April 10, 2002. Among those present during Stewart's interviews were Special Agent Catherine Farmer of the FBI and Helene Glotzer, a lawyer with the SEC's Enforcement Division. Bacanovic was interviewed by telephone on January 7, 2002. Present at that interview were Glotzer and another SEC attorney, Jill Slansky, as well as David Marcus, a Merrill Lynch attorney. On February 13, 2002, Bacanovic testified under oath before the SEC. He was questioned by three SEC attorneys: Glotzer, Slansky, and Laurent Sacharoff. His testimony was tape recorded.

The jury convicted Stewart of making false statements to investigators during her February 4 interview, in violation of 18 U.S.C. § 1001. The jury found Stewart guilty of making the following false statements, each of which was a specification in Count Three of the Indictment. Stewart told the Government investigators that she spoke to Bacanovic on December 27 and instructed him to sell her ImClone shares after he informed her that ImClone was trading below $60 per share. Stewart also stated that during the same telephone call, she and Bacanovic discussed the performance of the stock of her own company, Martha Stewart Living Omnimedia ("MSLO"), and discussed K-Mart. She told investigators that she had decided to sell her ImClone shares at that time because she did not want to be bothered during her vacation. Stewart stated that she did not know if there was any record of a telephone message

1. 323 F. Supp. at 608-10 (footnote omitted).

left by Bacanovic on December 27 in her assistant's message log. She also said that since December 28, she had only spoken with Bacanovic once regarding ImClone, and they had only discussed matters in the public arena. Finally, Stewart told investigators that since December 28, Bacanovic had told her that Merrill Lynch had been questioned by the SEC regarding ImClone, but that he did not tell her that he had been questioned by the SEC or that he had been questioned about her account.

The jury acquitted Stewart of one specification charged in Count Three: her statement that she and Bacanovic had agreed, at a time when ImClone was trading at $74 per share, that she would sell her shares when ImClone started trading at $60 per share.

The jury found Stewart guilty of making the following false statements to investigators during her April 10 interview. Each of these statements was a specification in Count Four of the Indictment. Stewart said that she did not recall if she and Bacanovic had spoken about Waksal on December 27 and that she did not recall being informed that any of the Waksals were selling their ImClone stock. Stewart also reiterated that she spoke to Bacanovic on December 27, that he told her the price of ImClone shares, and that he suggested that she sell her holdings.

The jury did not find Stewart guilty of one false statement specification charged in Count Four: her statement that sometime in November or December of 2001, after she sold ImClone shares held in the Martha Stewart Defined Pension Trust, she and Bacanovic decided she would sell her remaining ImClone shares when they started trading at $60 per share.

The jury found Bacanovic guilty of making one false statement during his January 7 interview with the SEC, in violation of 18 U.S.C. § 1001. This was a specification in Count Two of the Indictment, which charged Bacanovic with falsely stating that he had spoken to Stewart on December 27, that he told Stewart during that conversation that ImClone's share price had dropped, and that Stewart had instructed him to sell her shares.

The jury found Bacanovic not guilty of the other false statement charged in Count Two: his statement that on December 20, 2001, he had a conversation with Stewart in which she decided to sell her ImClone stock at $60 per share.

The jury also convicted Bacanovic of perjury in violation of 18 U.S.C. § 1621, for one statement he made during his February 13 testimony before the SEC. Perjury was the charge in Count Six of the Indictment. Bacanovic stated that on the morning of December 27, he had left a message for Stewart with her assistant, Ann Armstrong. He said that the message requested that Stewart return his call, and advised her of the price at which ImClone was then trading.

The jury acquitted Bacanovic of five other perjury specifications charged in Count Six. These specifications related to conversations Bacanovic had had with Stewart subsequent to her December 27 trade, the circumstances of her decision on December 20 to sell ImClone at $60 per share, and a worksheet he had used during their December 20 conversation.

The jury acquitted Bacanovic of a charge of making and using a false document, which was charged as a violation of 18 U.S.C. § 1001 in Count Five of the Indictment. This count was based on a worksheet that Bacanovic gave the SEC in the

course of their investigation. Bacanovic claimed that he had used the worksheet during his December 20 conversation with Stewart. The worksheet listed Stewart's holdings and contained numerous handwritten notations in blue ink. The bullet point before ImClone's entry on the worksheet was circled in blue ink, as were the bullet points preceding several other entries on the page. Beside ImClone's name was a notation, "@60," also in blue ink. The "@60" notation was the basis of the charge.

The jury also convicted defendants of conspiracy and obstruction of an agency proceeding in violation of 18 U.S.C. § 1505. With respect to the conspiracy charge, the jury found that the defendants conspired to carry out all three objects of the conspiracy: making false statements, perjury, and obstruction of an agency proceeding.

. . .

NOTES

1. The Superseding Indictment in the *Martha Stewart* case may be found under Applications of Obstruction Statues in Unit 3 page of AppliedAntitrust.com.

2. In United States v. Martha Stewart, 433 F.3d 273 (2d Cir. 2006), the Second Circuit affirmed the convictions.

3. Note that Stewart was convicted only on four counts of obstruction. The jury acquitted on the stock manipulation charges. Stewart was sentenced to five months in prison to be served concurrently on all four counts, to be followed by supervised release for a term of two years with the special condition of five months of home confinement with electronic monitoring. In addition, Stewart was sentenced to pay a fine of $30,000 plus a special assessment of $400.

4. Although Stewart appealed her conviction, she elected not to seek a stay of her sentence pending appeal. Judge Cedarbaum recommended to the Bureau of Prisons, a division of the Department of Justice, that Stewart be incarcerated in the Federal Correctional Institution, Danbury, in Connecticut, Stewart's first choice, which was close to her home in Westport, Connecticut. The ultimate decision, however, rests with the Bureau. The Bureau rejected Danbury because news media could too easily access the facility, as well as the Federal Correctional Complex, Coleman, in Sumter County, Florida, Stewart's second choice, because of the need to move prisoners from another federal prison damaged by Hurricane Ivan. Instead, the Bureau sent Stewart to the Federal Prison Camp, Alderson, a minimum-security facility in remote West Virginia. Stewart reported to prion on October 8, 2004, and was released five months later on March 4, 2005, to begin her two-year term of supervised release.[2]

2. *See, e.g.*, Constance L. Hays, *Martha Stewart's Sentence: The Overview*, N.Y. TIMES, July 17, 2004; Barry Meier, *Martha Stewart Assigned to Prison in West Virginia*, N.Y. TIMES, Sept. 30, 2004.

9

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISI

Case:2:16-cr-20641
Judge: Drain, Gershwin A.
MJ: Patti, Anthony P.
Filed: 09-21-2016 At 01:39 PM
INDI USA v. HIGASHIDA ET AL. (SO)

UNITED STATES OF AMERICA

CRIMINAL

v.

COUNT I: 18 U.S.C. §§ 371, 1519
COUNT II: 18 U.S.C. § 1512(b)(2)(B)

D-1, FUTOSHI HIGASHIDA and
D-2, MIKIO KATSUMARU,

Defendants.
_____/

INDICTMENT

The Grand Jury charges:

General Allegations

At times relevant to this Indictment:

1. Defendant FUTOSHI HIGASHIDA was a citizen of Japan and resided in Japan and the United States. From at least as early as June 2008 until in or about July 2011, HIGASHIDA was employed by COMPANY A as a manager in the Business Administration and Marketing Department. During this period, HIGASHIDA reported to defendant MIKIO KATSUMARU. From in or about August 2011 until in or about September 2011, HIGASHIDA was employed by COMPANY B as Vice President. From in or about October 2011 until at least September 2012, HIGASHIDA was employed by COMPANY B as President. While working at COMPANY B, HIGASHIDA's office was located in Novi, Michigan.

2. Defendant MIKIO KATSUMARU was a citizen and resident of Japan. From at least as early as June 2008 until at least September 2012, KATSUMARU was employed by COMPANY A in Japan as the head of the Sales and Marketing Division.

3. COMPANY A was a corporation based in Japan. COMPANY B was a joint venture owned by COMPANY A and another company. COMPANY B had an office in Novi, Michigan. COMPANY A and COMPANY B manufactured and sold automotive parts to automobile manufacturers in the United States and elsewhere.

4. INDIVIDUAL A was a citizen and resident of Japan. From at least as early as June 2008 until at least September 2012, INDIVIDUAL A was employed by COMPANY A in Japan as a manager in the Sales and Marketing Division. From at least as early as June 2008 until in or about March 2012, INDIVIDUAL A reported to INDIVIDUAL C.

5. INDIVIDUAL B was a citizen of Japan and resided in Japan and the United States. From at least as early as June 2008 until in or about March 2011, INDIVIDUAL B was employed by COMPANY B in Novi, Michigan, as a sales manager. From in or about April 2011 until at least September 2012, INDIVIDUAL B was employed by COMPANY A in Japan as a junior manager in the Sales and Marketing Division. From in or about April 2011 until in or about March 2012, INDIVIDUAL B reported to INDIVIDUAL A.

6. INDIVIDUAL C was a citizen and resident of Japan. From at least as early as June 2008 until at least September 2012, INDIVIDUAL C was employed by COMPANY A in Japan as a manager in the Sales and Marketing Division. During this period, INDIVIDUAL C reported to defendant KATSUMARU.

7. INDIVIDUAL D was a citizen of Japan and resided in Japan and the United States. From at least as early as June 2008 until in or about January 2009, INDIVIDUAL D was employed by COMPANY A as a manager in the Sales and Marketing Division. From in or about February 2009 until at least September 2012, INDIVIDUAL D was employed by

COMPANY B in Novi, Michigan, as a sales director. From in or about October 2011 until at least September 2012, INDIVIDUAL D reported to defendant HIGASHIDA.

8. Under the Sherman Antitrust Act, Title 15, United States Code, Section 1, it was a crime for employees of competitor companies to conspire with each other to suppress and eliminate competition in unreasonable restraint of interstate and foreign trade and commerce. A criminal violation of the Sherman Antitrust Act ("antitrust crime") by a corporation was punishable by a fine of up to $100 million, and an antitrust crime by an individual was punishable by imprisonment of up to ten years and a fine of up to $1 million.

9. The Federal Bureau of Investigation ("FBI") was an agency of the United States with jurisdiction to investigate violations of federal criminal laws, including antitrust crimes. The United States Department of Justice was a department of the United States with jurisdiction to investigate and prosecute violations of federal criminal laws, including antitrust crimes.

10. In or about May 2007, defendant HIGASHIDA and other employees of COMPANY A learned that an employee of a Japanese company was arrested in the United States for an alleged antitrust crime.

11. In or about January 2012, defendant HIGASHIDA learned that other automotive parts companies and their employees had been prosecuted in the United States for antitrust crimes.

12. On October 8, 2015, three employees of COMPANY A were charged in the Eastern District of Kentucky with an antitrust crime, for knowingly participating in a conspiracy to suppress and eliminate competition for automotive parts sold to certain automobile manufacturers in the United States and elsewhere from at least as early as September 2003 and continuing until at least October 2011.

13. On September 1, 2016, COMPANY A was charged in the Eastern District of Kentucky with an antitrust crime, for knowingly participating in a conspiracy to suppress and eliminate competition for automotive parts sold to certain automobile manufacturers in the United States and elsewhere from at least as early as January 2000 until at least September 2012.

COUNT ONE
(18 U.S.C. §§ 371 and 1519 – Conspiracy to Obstruct an Investigation of a Matter within U.S. Jurisdiction)

1. The allegations in Paragraphs 1 - 13 of the General Allegations are realleged and incorporated here.

2. From at least as early as June 2008 until at least September 2012, the exact dates being unknown to the grand jury, in the Eastern District of Michigan and elsewhere,

D-1 FUTOSHI HIGASHIDA and
D-2 MIKIO KATSUMARU,

defendants herein, along with others known and unknown to the grand jury, knowingly conspired to commit an offense against the United States, namely, obstruction of an investigation of a matter within the jurisdiction of a department and agency of the United States, in violation of Title 18, United States Code, Section 1519, all in violation of Title 18, United States Code, Section 371.

3. The substantial terms of the conspiracy were to destroy, conceal, and cover up records and documents, with the intent to impede, obstruct, and influence an investigation of a matter within the jurisdiction of the FBI and the United States Department of Justice, namely, an investigation of an antitrust crime committed by COMPANY A, COMPANY B, and their employees, and in relation to and in contemplation of such matter, in violation of Title 18, United States Code, Section 1519.

4. Other individuals, not made defendants in this Count, participated as co-conspirators in the offense charged in this Count and performed acts and made statements in furtherance of it.

Means and Methods

5. For the purpose of forming and carrying out the conspiracy alleged in this Count, the defendants and co-conspirators did those things that they conspired to do, including the following actions intended to impede, obstruct, and influence an investigation of a matter within the jurisdiction of the FBI and the United States Department of Justice:

a. Instructed employees of COMPANY A and COMPANY B to delete emails and electronic records referring to communications with competitor companies;

b. Instructed employees of COMPANY A and COMPANY B to destroy hard copy documents referring to communications with competitor companies;

c. Deleted emails and electronic records referring to communications with competitor companies; and

d. Destroyed hard-copy documents referring to communications with competitor companies.

Overt Acts

6. In furtherance of the conspiracy and to effect the object of the conspiracy, the defendants and co-conspirators committed and caused to be committed the following overt acts, among others, in the Eastern District of Michigan and elsewhere:

a. On or about March 9, 2009, defendant HIGASHIDA instructed INDIVIDUAL A to delete an email discussing competitor prices, and informed INDIVIDUAL A

that if someone were arrested in the United States, it would result in imprisonment and a fine of at least 10 billion Yen.

b. On or about March 13, 2009, based on the previous instruction from defendant HIGASHIDA, INDIVIDUAL A instructed employees of COMPANY A and COMPANY B, including INDIVIDUAL B, to delete information reflecting competitor communications.

c. On or about February 24, 2010, defendant KATSUMARU sent an email to employees of COMPANY A and COMPANY B instructing them not to maintain records of communications with competitors, after receiving an email from defendant HIGASHIDA that contained a copy of a Japanese newspaper article. The article reported an investigation and raid of automobile parts suppliers for antitrust violations in Japan.

d. At a meeting in 2012, defendant KATSUMARU instructed employees of COMPANY A, including INDIVIDUAL A, to destroy documents that would show competitor communications.

e. On or about January 24, 2012, defendant HIGASHIDA instructed INDIVIDUAL D to delete an email in which INDIVIDUAL D discussed competitor communications, and to delete past emails reflecting competitor communications.

f. On or about July 23, 2012, defendant HIGASHIDA instructed INDIVIDUAL D to make sure that no email or cell phone records remained that would show competitor communications.

g. On or about September 25, 2012, defendant HIGASHIDA instructed INDIVIDUAL D to ensure that no phone numbers or call records remained on his

cellular telephone and no data remained on his computer that would reflect competitor communications. HIGASHIDA also informed INDIVIDUAL D that the FBI could visit without warning to collect the data, and that if INDIVIDUAL D attempted to delete the data at that time, he would be arrested.

COUNT TWO
(18 U.S.C. § 1512 – Attempted Obstruction of Justice)

1. The allegations in Paragraphs 1, 3, and 7 – 13 of the General Allegations are realleged and incorporated here.

2. On or about September 25, 2012, in the Eastern District of Michigan,

D-1 FUTOSHI HIGASHIDA,

defendant herein, did knowingly attempt to corruptly persuade INDIVIDUAL D, with the intent to cause and induce INDIVIDUAL D to alter objects, namely INDIVIDUAL D's cellular telephone and computer, with the intent to impair those objects' integrity and availability for use in an official proceeding, namely, a prosecution of COMPANY B and its employees for an antitrust crime before a court of the United States, in violation of Title 18, United States Code, Section 1512(b)(2)(B).

A TRUE BILL

s/ Grand Jury Foreperson
FOREPERSON

Dated: September 21, 2016

s/ Brent Snyder
BRENT SNYDER
Deputy Assistant Attorney General

s/ Frank J. Vondrak
FRANK J. VONDRAK
Chief, Chicago Office

s/ Marvin N. Price, Jr.
MARVIN N. PRICE, JR.
Director of Criminal Enforcement

Antitrust Division
U.S. Department of Justice

s/ Andre M. Geverola
Andre M. Geverola
Assistant Chief
L. Heidi Manschreck
Jesse L. Reising
Chester Choi
Trial Attorneys
Antitrust Division
U.S. Department of Justice
Chicago Office
209 S. LaSalle Street, Suite 600
Chicago, Illinois 60604
312-984-7200

United States District Court Eastern District of Michigan	**Criminal Case Cover**

NOTE: It is the responsibility of the Assistant U.S. Attorney signing this form to complete

Case:2:16-cr-20641
Judge: Drain, Gershwin A.
MJ: Patti, Anthony P.
Filed: 09-21-2016 At 01:39 PM
INDI USA v. HIGASHIDA ET AL. (SO)

Companion Case Information	**Companion Case Number:**
This may be a companion case based upon **LCrR 57.10 (b)(4)[1]:**	**Judge Assigned:**
☐ **Yes** ☒ **No**	**AUSA's Initials:**

Case Title: USA v. Futoshi Higashida and Mikio Katsumaru

County where offense occurred : Wayne

Check One: ☒ **Felony** ☐ **Misdemeanor** ☐ **Petty**

✓ Indictment/____Information --- **no** prior complaint.
____Indictment/____Information --- based upon prior complaint [**Case number:**]
____Indictment/____Information --- based upon **LCrR 57.10 (d)** ***[Complete Superseding section below]***.

Superseding Case Information

Superseding to Case No: _____ **Judge:** _____

☐ Corrects errors; no additional charges or defendants.
☐ Involves, for plea purposes, different charges or adds counts.
☐ Embraces same subject matter but adds the additional defendants or charges below:

Defendant name	**Charges**	**Prior Complaint (if applicable)**

Please take notice that the below listed Assistant United States Attorney is the attorney of record for the above captioned case.

September 21, 2016
Date

Andre M. Geverola, Assistant Chief
U.S. Department of Justice, Antitrust Division
209 S. LaSalle Street, Suite 600
Chicago, Illinois 60604
Fax: 312-984-7299
E-Mail address: andre.geverola@usdoj.gov
Attorney Bar #: IL 6281457

[1] Companion cases are matters in which it appears that (1) substantially similar evidence will be offered at trial, or (2) the same or related parties are present, and the cases arise out of the same transaction or occurrence. Cases may be companion cases even though one of them may have already been terminated.

Leniency Policies

CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "Leniency" means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. Leniency Before an Investigation Has Begun

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;

4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

5. Where possible, the corporation makes restitution to injured parties; and

6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. **Alternative Requirements for Leniency**

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;

2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;

3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;

5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

6. Where possible, the corporation makes restitution to injured parties; and

7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. **Leniency for Corporate Directors, Officers, and Employees**

If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.

If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. **Leniency Procedure**

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their

views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1993

Department of Justice

LENIENCY POLICY FOR INDIVIDUALS

On August 10, 1993, the Division announced a new Corporate Leniency Policy under which a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions. The Corporate Leniency Policy also sets out the conditions under which the directors, officers and employees who come forward with the company, confess, and cooperate will be considered for individual leniency. The Division today announces a new Leniency Policy for Individuals that is effective immediately and applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware. Under this Policy, "leniency" means not charging such an individual criminally for the activity being reported.

A. Requirements for Leniency for Individuals

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

1. At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and

3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Applicability of the Policy

Any individual who does not qualify for leniency under Part A of this Policy will be considered for statutory or informal immunity from criminal prosecution. Such immunity decisions will be made by the Division on a case-by-case basis in the exercise of its prosecutorial discretion.

If a corporation attempts to qualify for leniency under the Corporate Leniency Policy, any directors, officers or employees who come forward and confess with the corporation will be considered for leniency solely under the provisions of the Corporate Leniency Policy.

C. Leniency Procedure

If the staff that receives the request for leniency believes the individual qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Deputy Assistant Attorney General for Litigation, setting forth the reasons why leniency should be granted. The staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Deputy Assistant Attorney General for Litigation will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, the individual and his or her counsel may wish to seek an appointment with the Deputy Assistant Attorney General for Litigation to make their views known. Individuals and their counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1994

U.S. Department of Justice

Antitrust Division

Office of the Deputy Assistant Attorney General

950 Pennsylvania Ave., Suite 3214
Washington, D.C. 20530

Philip E. Haehl, President
Shelby Materials
157 E. Rampart Road
Shelbyville, Indiana 46176

Dear Mr. Haehl:

This letter sets forth the terms and conditions of an agreement between the Antitrust Division of the United States Department of Justice and Shelby Gravel, Inc., d/b/a/ Shelby Materials ("Shelby"), in connection with possible price fixing or other conduct violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the ready mixed concrete industry in the Indianapolis, Indiana metropolitan area and the Seymour/Columbus, Indiana area. This agreement is conditional and depends upon Shelby, satisfying the conditions set forth below. After all of these conditions are met, the Division will notify Shelby in writing that the application has been granted. It is further agreed that disclosures made by counsel for Shelby in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege or the work-product privilege.

AGREEMENT

1. **Representations**: Shelby desires to report to the Antitrust Division possible price fixing activity or other conduct violative of the Sherman Act in the ready mixed concrete industry in the Indianapolis, Indiana metropolitan area and the Seymour/Columbus, Indiana area ("the anticompetitive activity being reported"). Shelby represents to the Antitrust Division that, in connection with the anticompetitive activity being reported, it:

(a) took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity; and

(b) did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the anticompetitive activity being reported.

2. **Cooperation**: Shelby agrees to provide full, continuing and complete cooperation to the Antitrust Division in connection with the activity being reported, including, but not limited to, the following:

(a) providing a full exposition of all facts known to Shelby relating to the anticompetitive activity being reported;

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(b) providing promptly, and without requirement of subpoena, all documents or other items in its possession, custody or control, wherever located, requested by the Antitrust Division, to the extent not already produced;

(c) using its best efforts to secure the ongoing, full and truthful cooperation of the current and former directors, officers and employees of Shelby, and encouraging such persons voluntarily to provide the Antitrust Division with any information they may have relevant to the anticompetitive activity being reported;

(d) facilitating the ability of current and former directors, officers and employees to appear for such interviews or testimony in connection with the anticompetitive activity being reported as the Antitrust Division may require at the times and places designated by the Antitrust Division;

(e) using its best efforts to ensure that current and former directors, officers and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported respond completely, candidly and truthfully to all questions asked in interviews and grand jury appearances and at trial;

(f) using its best efforts to ensure that current and former directors, officers and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported make no attempt either falsely to protect or falsely to implicate any person or entity; and

(g) making all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of the anticompetitive activity being reported, in which Shelby was a participant.

3. **Corporate Leniency**: Subject to verification of Shelby's representations in paragraph 1 above, and subject to its full, continuing and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept Shelby into Part B of the Corporate Leniency Program with respect to the Indianapolis, Indiana Metropolitan area and to accept Shelby into Part A of the Corporate Leniency Program with respect to the Seymour/Columbus, Indiana area, as explained in an Antitrust Division policy statement dated August 10, 1993 (attached). Pursuant to that policy, the Antitrust Division agrees not to bring any criminal prosecution against Shelby for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported. The commitments in this paragraph are binding only upon the Antitrust Division, although, upon request of Shelby, the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. If the Antitrust Division at any time determines that Shelby has violated this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of Shelby into the Corporate Leniency Program. Should the Antitrust Division revoke the conditional acceptance of Shelby into the Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against Shelby, without limitation. Should such a prosecution be initiated, any documentary or other

information provided by Shelby, as well as any statements or other information provided by any current or former director, officer or employee of Shelby to the Antitrust Division pursuant to this Agreement, may be used against Shelby in any such prosecution.

4. **Non-Prosecution Protection For Corporate Directors, Officers And Employees**: Subject to Shelby's full, continuing and complete cooperation, the Antitrust Division agrees that current and former directors, officers and employees of Shelby who admit their knowledge of, or participation in, and fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive activity being reported, shall not be prosecuted criminally by the Antitrust Division for any act or offense committed during their period of employment at Shelby prior to the date of this letter in connection with the anticompetitive activity being reported. Such full and truthful cooperation shall include, but not be limited to:

(a) producing in the United States all documents and records, including personal documents and records, and other materials requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews in the United States upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with the anticompetitive activity being reported, without falsely implicating any person or intentionally withholding any information;

(d) otherwise voluntarily providing the United States with any materials or information, not requested in (a) - (c) of this paragraph, that he or she may have relevant to the anticompetitive activity being reported; and

(e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings in the United States, fully, truthfully and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402) and obstruction of justice (18 U.S.C. § 1503), in connection with the anticompetitive activity being reported.

The commitments in this paragraph are binding only upon the Antitrust Division, although, upon the request of Shelby, the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. In the event a current or former director, officer or employee of Shelby fails to comply fully with his/her obligations hereunder, this Agreement as it pertains to such individual shall be void, and any leniency, immunity or non-prosecution granted to such individual under this Agreement may be revoked by the Antitrust Division. Should any leniency, immunity or non-prosecution granted be revoked, the Antitrust Division may thereafter prosecute such person criminally, and any statements or other information provided by such person to the Antitrust Division pursuant to this Agreement may be used against him/her in such prosecution.

5. **Entire Agreement**: This letter constitutes the entire agreement between the Antitrust Division and Shelby, and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein.

6. **Authority And Capacity**: The Antitrust Division and Shelby represent and warrant each to the other that the signatories to this Agreement on behalf of each party hereto have all the authority and capacity necessary to execute this Agreement and to bind the respective parties hereto.

The signatories below acknowledge acceptance of the foregoing terms and conditions.

Sincerely yours,

Date: JUN 16 2004

James M. Griffin
Deputy Assistant Attorney General
Antitrust Division

Date: 6/22/04

Philip E. Haehl
President
Shelby Materials

Date: 6/22/04

David R. Hennessy
Counsel for Shelby Materials

U. S. Department of Justice

Antitrust Division

Office of the Deputy Assistant Attorney General

950 Pennsylvania Ave., Suite 3218
Washington, D.C. 20530-0001

Susan B. Rivas, Esq.
Ice Miller
One American Square
Box 82001
Indianapolis, IN 46282-0002

Dear Ms. Rivas:

This letter sets forth the terms and conditions of an agreement between the Antitrust Division of the United States Department of Justice and Irving Materials, Inc. ("IMI"), in connection with possible price fixing or other conduct violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the ready mixed concrete industry in the metropolitan areas of Bloomington, Indiana; Marion, Indiana; and Muncie, Indiana. This Agreement is conditional and depends upon IMI satisfying the conditions set forth below. After all of these conditions are met, the Division will notify IMI in writing that the application has been granted. It is further agreed that disclosures made by counsel for IMI in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege or the work-product privilege.

AGREEMENT

1. **Representations**: IMI desires to report to the Antitrust Division possible price fixing activity or other conduct violative of the Sherman Act in the ready mixed concrete industry in the metropolitan areas of Bloomington, Indiana; Marion, Indiana; and Muncie, Indiana ("the anticompetitive activity being reported"). IMI represents to the Antitrust Division that, in connection with the anticompetitive activity being reported, it:

(a) took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity; and

(b) did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the anticompetitive activity being reported.

2. **Cooperation**: IMI agrees to provide full, continuing and complete cooperation to the Antitrust Division in connection with the activity being reported, including, but not limited to, the following:

(a) providing a full exposition of all facts known to IMI relating to the anticompetitive activity being reported;

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(b) providing promptly, and without requirement of subpoena, all documents or other items in its possession, custody or control, wherever located, requested by the Antitrust Division, to the extent not already produced;

(c) using its best efforts to secure the ongoing, full and truthful cooperation of the current and former directors, officers and employees of IMI, and encouraging such persons voluntarily to provide the Antitrust Division with any information they may have relevant to the anticompetitive activity being reported;

(d) facilitating the ability of current and former directors, officers and employees to appear for such interviews or testimony in connection with the anticompetitive activity being reported as the Antitrust Division may require at the times and places designated by the Antitrust Division;

(e) using its best efforts to ensure that current and former directors, officers and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported respond completely, candidly and truthfully to all questions asked in interviews and grand jury appearances and at trial;

(f) using its best efforts to ensure that current and former directors, officers and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported make no attempt either falsely to protect or falsely to implicate any person or entity; and

(g) making all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of the anticompetitive activity being reported, in which IMI was a participant.

3. **Corporate Leniency**: Subject to verification of IMI's representations in paragraph 1 above, and subject to its full, continuing and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept IMI into Part A of the Corporate Leniency Program, as explained in an Antitrust Division policy statement dated August 10, 1993 (attached). Pursuant to that policy, the Antitrust Division agrees not to bring any criminal prosecution against IMI for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported. The commitments in this paragraph are binding only upon the Antitrust Division, although, upon request of IMI, the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. If the Antitrust Division at any time determines that IMI has violated this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of IMI into the Corporate Leniency Program. Should the Antitrust Division revoke the conditional acceptance of IMI into the Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against IMI, without limitation. Should such a prosecution be initiated, any documentary or other information provided by IMI, as well as any statements or other information provided by any current or former

director, officer or employee of IMI to the Antitrust Division pursuant to this Agreement, may be used against IMI in any such prosecution.

4. **Non-Prosecution Protection For Corporate Directors, Officers And Employees**: Subject to IMI's full, continuing and complete cooperation, the Antitrust Division agrees that current and former directors, officers and employees of IMI who admit their knowledge of, or participation in, and fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive activity being reported, shall not be prosecuted criminally by the Antitrust Division for any act or offense committed during their period of employment at IMI prior to the date of this letter in connection with the anticompetitive activity being reported. Such full and truthful cooperation shall include, but not be limited to:

(a) producing in the United States all documents and records, including personal documents and records, and other materials requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews in the United States upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with the anticompetitive activity being reported, without falsely implicating any person or intentionally withholding any information;

(d) otherwise voluntarily providing the United States with any materials or information, not requested in (a) - (c) of this paragraph, that he or she may have relevant to the anticompetitive activity being reported; and

(e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings in the United States, fully, truthfully and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402) and obstruction of justice (18 U.S.C. § 1503), in connection with the anticompetitive activity being reported.

The commitments in this paragraph are binding only upon the Antitrust Division, although, upon the request of IMI, the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. In the event a current or former director, officer or employee of IMI fails to comply fully with his/her obligations hereunder, this Agreement as it pertains to such individual shall be void, and any leniency, immunity or non-prosecution granted to such individual under this Agreement may be revoked by the Antitrust Division. Should any leniency, immunity or non-prosecution granted be revoked, the Antitrust Division may thereafter prosecute such person criminally, and any statements or other information provided by such person to the Antitrust Division pursuant to this Agreement may be used against him/her in such prosecution.

5. **Entire Agreement**: This letter constitutes the entire agreement between the Antitrust Division and IMI, and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein.

6. **Authority And Capacity**: The Antitrust Division and IMI represent and warrant each to the other that the signatories to this Agreement on behalf of each party hereto have all the authority and capacity necessary to execute this Agreement and to bind the respective parties hereto.

The signatories below acknowledge acceptance of the foregoing terms and conditions.

Sincerely yours,

Date: 5/26/05

Scott D. Hammond
Deputy Assistant Attorney General
Antitrust Division

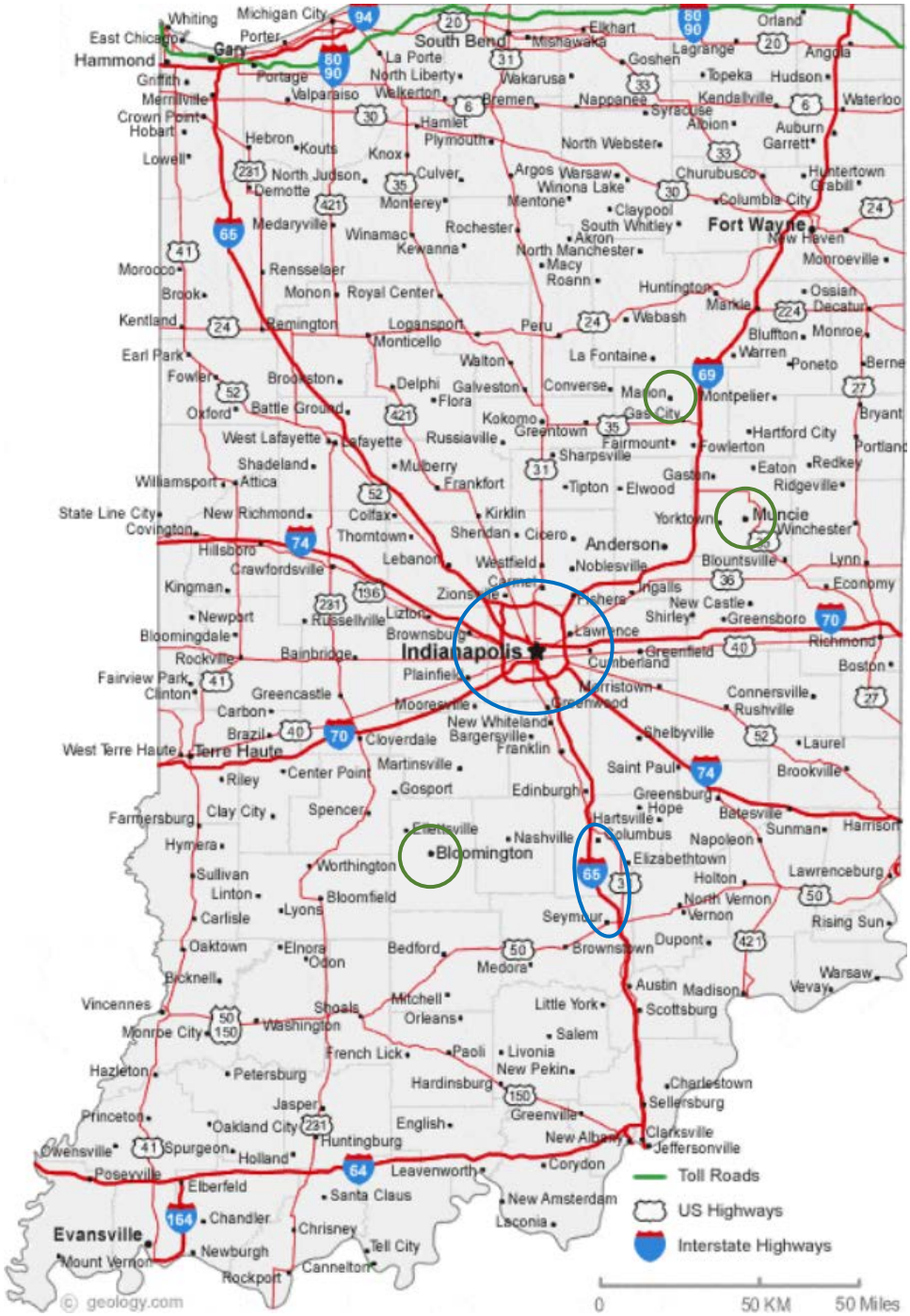
Date: 6/16/05

Earl G. Brinker
Secretary
Irving Materials, Inc.

Date: June 16, 2005

Susan B. Rivas, Esq.
Counsel for Irving Materials, Inc.

INDIANA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ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT OF 2004[1]

Subtitle A—Antitrust Enforcement Enhancements and Cooperation Incentives

Section 211. Sunset

(a) *In general*.—Except as provided in subsection (b), the provisions of sections 211 through 214 of this subtitle shall cease to have effect 16 years after the date of enactment of this Act.

(b) *Exception*.—With respect to an applicant who has entered into an antitrust leniency agreement on or before the date on which the provisions of sections 211 through 214 of this subtitle shall cease to have effect, the provisions of sections 211 through 214 of this subtitle shall continue in effect.

(b) Exceptions.—With respect to—

(1) a person who receives a marker on or before the date on which the provisions of section 211 through 214 of this subtitle shall cease to have effect that later results in the execution of an antitrust leniency agreement; or

(2) an applicant who has entered into an antitrust leniency agreement on or before the date on which the provisions of sections 211 through 214 of this subtitle shall cease to have effect,

the provisions of sections 211 through 214 of this subtitle shall continue in effect.

Section 212. Definitions

In this subtitle:

(1) *Antitrust Division*.—The term "Antitrust Division" means the United States Department of Justice Antitrust Division.

(2) *Antitrust Leniency Agreement*.—The term "antitrust leniency agreement," or "agreement," means a leniency letter agreement, whether conditional or final, between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of execution of the agreement.

(3) *Antitrust Leniency Applicant*.—The term "antitrust leniency applicant,'" or "applicant," means, with respect to an antitrust leniency agreement, the person that has entered into the agreement.

(4) *Claimant*.—The term "claimant" means a person or class, that has brought, or on whose behalf has been brought, a civil action alleging a violation of section 1 or 3 of the Sherman Act or any similar State law, except that the term does not include a State or a subdivision of a State with respect to a civil action brought to recover damages sustained by the State or subdivision.

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[1] Pub. L. No. 108-237, tit. II, 118 Stat. 661, 665, *as amended by* Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010) (codified as 15 U.S.C.A. § 1 note). As amended, ACPERA will expire on June 23, 2020.

(5) *Cooperating Individual*.—The term "cooperating individual" means, with respect to an antitrust leniency agreement, a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement.

(6) *Marker*.—The term "marker" means an assurance given by the Antitrust Division to a candidate for corporate leniency that no other company will be considered for leniency, for some finite period of time, while the candidate is given an opportunity to perfect its leniency application.

(7) *Person*.—The term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act.

Section 213. Limitation on recovery

(a) *In general*.—Subject to subsection (d), in any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.

(b) *Requirements*.—Subject to subsection (c), an antitrust leniency applicant or cooperating individual satisfies the requirements of this subsection with respect to a civil action described in subsection (a) if the court in which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant or cooperating individual, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action, which cooperation shall include—

(1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;

(2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and

(3)

(A) in the case of a cooperating individual—

(i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and

(ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or

(B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).

(c) *Timeliness*.—The court shall consider, in making the determination concerning satisfactory cooperation described in subsection (b), the timeliness of the applicant's or cooperating individual's cooperation with the claimant.

(d) *Cooperation After Expiration of Stay or Protective Order*.—If the Antitrust Division does obtain a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement, once the stay or protective order, or a portion thereof, expires or is terminated, the antitrust leniency applicant and cooperating individuals shall provide without unreasonable delay any cooperation described in paragraphs (1) and (2) of subsection (b) that was prohibited by the expired or terminated stay or protective order, or the expired or terminated portion thereof, in order for

(e) *Continuation*.—Nothing in this section shall be construed to modify, impair, or supersede the provisions of sections 4, 4A, and 4C of the Clayton Act relating to the recovery of costs of suit, including a reasonable attorney's fee, and interest on damages, to the extent that such recovery is authorized by such sections.

Section 214. Rights, Authorities, And Liabilities Not Affected

Nothing in this subtitle shall be construed to—

(1) affect the rights of the Antitrust Division to seek a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement to prevent the cooperation described in section 213(b) of this subtitle from impairing or impeding the investigation or prosecution by the Antitrust Division of conduct covered by the agreement;

(2) create any right to challenge any decision by the Antitrust Division with respect to an antitrust leniency agreement; or

(3) affect, in any way, the joint and several liability of any party to a civil action described in section 213(a) of this subtitle, other than that of the antitrust leniency applicant and cooperating individuals as provided in section 213(a) of this subtitle.

Indictments, Informations and Criminal Complaints

RIGHT TO INDICTMENT BY GRAND JURY

U.S. Constitution amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [Emphasis added]

MODEL FEDERAL GRAND JURY CHARGE[1]

Ladies and Gentlemen:

1. Now that you have been empaneled and sworn as a Grand Jury, it is the Court's responsibility to instruct you as to the law which should govern your actions and your deliberations as Grand Jurors.

2. The framers of our Federal Constitution deemed the Grand Jury so important for the administration of justice, they included it in the Bill of Rights. The Fifth Amendment to the United States Constitution provides in part that no person shall be held to answer for a capital or otherwise infamous crime without action by a Grand Jury. An infamous crime is a serious crime which may be punished by imprisonment for more than one year. The purpose of the Grand Jury is to determine whether there is sufficient evidence to justify a formal accusation against a person—that is, to determine if there is "probable cause" to believe the person committed a crime. If law enforcement officials were not required to submit to an impartial grand jury proof of guilt as to a proposed charge against a person suspected of having committed a crime, they would be free to arrest a suspect and bring that suspect to trial no matter how little evidence existed to support the charge.

3. The Grand Jury is an independent body and does not belong to any branch of the government. As members of the Grand Jury, you, in a very real sense, stand between the government and the person being investigated by the government. A federal grand jury must never be made an instrument of private prejudice, vengeance, or malice. It is your duty to see to it that indictments are returned only against those who you find probable cause to believe are guilty and to see to it that the innocent are not compelled to go to trial.

4. A member of the Grand Jury who is related by blood or marriage to a person under investigation, or who knows that person well enough to have a biased state of mind as to that person, or is biased for any reason, should not participate in the investigation of that person or in the return of the indictment. This does not mean that if you have an opinion you should not participate in the investigation. However, it does mean that if you have a fixed opinion before you hear any evidence, either on a basis of friendship or ill will or some other similar motivation, you should not participate in that investigation and in voting on the indictment.

5. Sixteen of the twenty-three members of the Grand Jury constitute a quorum and must be present for the transaction of any business. If fewer than this number are present, even for a moment, the proceedings of the Grand Jury must stop.

[1] Approved by the Judicial Conference of the United States, March 2005.

Limitation on the Power of the Grand Jury

6. Although as Grand Jurors you have extensive powers, they are limited in several important respects.

7. You can only investigate conduct which violates federal criminal laws. Criminal activity which violates state law is outside your inquiry. Sometimes, though, the same conduct violates both federal and state law, and this you may properly consider.

8. There is also a geographic limitation on the scope of your inquiries in the exercise of your power. You may inquire only to federal offenses committed in this district.

9. You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you.

10. Furthermore, when deciding whether or not to indict, you should not consider punishment in the event of conviction.

The Grand Jury Procedures

11. The cases which you will hear will come before you in various ways. Frequently, suspects are arrested during or shortly after the commission of an alleged crime, and they are taken before a Magistrate Judge, who then holds a preliminary hearing to determine whether there is probable cause to believe that the person has committed a crime. If the Magistrate Judge finds such probable cause, he or she will direct that the person be held for the action of the Grand Jury so that you can independently consider whether there should be an indictment.

12. Other cases will be brought before you by a government attorney—the U.S. Attorney or an Assistant U.S. Attorney before an arrest but after an investigation has been conducted by a governmental agency such as the Federal Bureau of Investigation, the Treasury Department, the Drug Enforcement Administration, Postal Authorities, or other federal law enforcement officials.

13. Since the government attorney has the duty of prosecuting persons charged with the commission of federal crimes, the government attorney will present the matters which the government desires to have you consider. The government will point out to you the laws which it believes have been violated, and will subpoena for testimony before you such witnesses as the government attorney may consider important and necessary and also any other witnesses that you may request or direct be called before you.

14. If during the course of your hearings, a different crime other than the one you are investigating surfaces, you have the right to pursue this new crime. Although you can subpoena new witnesses and documents, you have no power to employ investigators or to expend federal funds for investigative purposes. If the government attorney refuses to assist you or if you believe he or she is not acting impartially, you

may take it up with me or any Judge of this Court. You may use this power even over the active opposition of the government's attorneys, if you believe it is necessary to do so in the interest of justice.

Evidence

15. The evidence you will consider will normally consist of oral testimony of witnesses and written documents. Each witness will appear before you separately. When the witness first appears before you, the Grand Jury foreperson will administer the witness an oath or affirmation, to testify truthfully. After this has been accomplished, the witness may be questioned. Ordinarily, the government attorney questions the witness first. Next, the foreperson may question the witness, and then any other members of the Grand Jury may ask questions. In the event a witness does not speak or understand the English language, an interpreter may be brought into the Grand Jury room to assist in the questioning.

16. Witnesses should be treated courteously and questions put to them in an orderly fashion. If you have any doubt whether it is proper to ask a particular question, ask the government attorney for advice. If necessary, a ruling may be obtained from the court.

17. You alone decide how many witnesses you want to hear. You can subpoena witnesses from anywhere in the country, directing the government attorney to issue necessary subpoenas. However, persons should not ordinarily be subjected to disruption of their daily lives, harassed, annoyed, or inconvenienced, nor should public funds be expended to bring in witnesses unless you believe they can provide meaningful evidence which will assist you in your investigation.

18. Every witness has certain rights when appearing before a Grand Jury. Witnesses have the right to refuse to answer any question if the answer would tend to incriminate them and the right to know that anything they say may be used against them. The Grand Jury should hold no prejudice against a witness who exercises the right against compulsory self-incrimination, and this can play no part in the return of any indictment.

19. Although witnesses are not permitted to have a lawyer present with them in the Grand Jury room, the law permits witnesses to confer with their lawyer outside of the Grand Jury room. Since an appearance before a Grand Jury may present complex legal problems requiring the assistance of a lawyer, you also can not hold it against a witness if a witness chooses to exercise this right and leaves the Grand Jury room to confer with an attorney.

20. Ordinarily, neither the person being investigated by the government nor any witnesses on behalf of that person will testify before the Grand Jury. Upon his or her request, preferably in writing, you may afford that person an opportunity to appear before you. Because the appearance of the person being investigated before you may raise complicated legal problems, you should seek the government attorney's advice and, if necessary, the Court's ruling before his or her appearance is permitted. Before

that person testifies, he or she must be advised of his or her rights and required to sign a formal waiver. You should be completely satisfied that the person being investigated understands what he or she is doing. You are not required to summon witnesses which that person may wish to have examined unless probable cause for an indictment may be explained away by their testimony.

21. The determination of whether a witness is telling the truth is something that you must decide. Neither the Court nor the prosecutors or any officers of the Court may make this determination for you. As you listen to witnesses presented to you in the Grand Jury room and hear their testimony, remember that you are the judge of each witness's credibility. You may believe the witness's testimony, or you may not believe it, in whole or in part. Determining the credibility of a witness involves a question of fact, not a question of law. It is for you to decide whether you believe the person's testimony. You may consider in that regard whether the witnesses are personally interested in the outcome of the investigation, whether their testimony has been corroborated or supported by other witnesses or circumstances, what opportunity they have had for observing or acquiring knowledge concerning the matters about which they testify, the reasonableness or probability of the testimony they relate to you, and their manner and demeanor in testifying before you.

22. Hearsay is testimony as to facts not known by the witness of the witness' own personal knowledge but which have been told or related to the witness by persons other than the person being investigated. Hearsay testimony, if deemed by you to be persuasive, may in itself provide a basis for returning an indictment. You must be satisfied only that there is evidence against the accused showing probable cause, even if such evidence is composed of hearsay testimony that might or might not be admissible in evidence at a trial.

23. Frequently, charges are made against more than one person. It will be your duty to examine the evidence as it relates to each person, and to make your finding as to each person. In other words, where charges are made against more than one person, you may indict all of the persons or only those persons who you believe properly deserve indictment.

Deliberation and Vote

24. After you have heard all the evidence you wish to hear in a particular matter, you will then proceed to deliberate as to whether the person being investigated should be indicted. No one other than your own members or an interpreter necessary to assist a juror who is hearing or speech impaired is to be present while you are deliberating or voting.

25. To return an indictment charging an individual with an offense, it is not necessary that you find that individual guilty beyond a reasonable doubt. You are not a trial jury and your task is not to decide the guilt or innocence of the person charged. Your task is to determine whether the government's evidence as presented to you is sufficient to cause you to conclude that there is probable cause to believe that the

person being investigated committed the offense charged. To put it another way, you should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's belief that the person being investigated is probably guilty of the offense charged.

26. Each juror has the right to express his or her view of the matter under consideration. Only after all Grand Jurors have been given full opportunity to be heard will a vote be taken. You may decide after deliberation among yourselves that further evidence should be considered before a vote is taken. In such case you may direct to subpoena the additional documents or witnesses you desire to consider.

27. When you have decided to vote, the foreperson shall designate a juror as secretary who will keep a record of the vote, which shall be filed with the Clerk of Court. The record does not include the names of the jurors but only the number of those voting for the indictment. Remember, at least sixteen jurors must be present at all times, and at least twelve members must vote in favor of an indictment before one may be returned.

28. If twelve or more members of the Grand Jury, after deliberation, believe that an indictment is warranted, then you will request the government attorney to prepare the formal written indictment if one has not already been prepared and presented to you. The indictment will set forth the date and place of the alleged offense, will assert the circumstances making the alleged conduct criminal, and will identify the criminal statute violated. The foreperson will sign the indictment as a true bill, in the space followed by the word "foreperson." It is the duty of the foreperson to sign every indictment, whether the foreperson voted for or against. If less than twelve members of the Grand Jury vote in favor of an indictment which has been submitted to you for your consideration, the foreperson will endorse the indictment "Not a True Bill" and return it to the Court and the Court will impound it.

29. Indictments which have been signed as a true bill will be presented to a Judge [or a Magistrate Judge] in open court by your foreperson at the conclusion of each deliberative session of the Grand Jury. In the absence of the foreperson, a deputy foreperson may act in place of the foreperson and perform all functions and duties of the foreperson.

Independence of the Grand Jury

30. It is extremely important for you to realize that under the United States Constitution, the Grand Jury is independent of the United States Attorney and is not an arm or agent of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, or any governmental agency charged with prosecuting a crime. Simply put, as I have already told you, the Grand Jury is an independent body and does not belong to any branch of the government.

31. However, as a practical matter you must work closely with the government attorneys. They will provide you with important service in helping you to find your way when confronted with complex legal matters. It is entirely proper that you should

receive this assistance. If past experience is any indication of what to expect in the future, then you can expect candor, honesty and good faith in matters presented by the government attorneys. However, ultimately, you must depend on your own independent judgment, never becoming an arm of the United States Attorney's office. The government attorneys are prosecutors. You are not. If the facts suggest that you should not indict, then you should not do so, even in the face of the opposition or statements of the government attorney. You would violate your oath if you merely "rubber-stamped" indictments brought before you by the government representatives.

32. Just as you must maintain your independence in your dealings with the government attorneys, so should your dealings with the Court be on a formal basis. If you should have a question for the Court or desire to make a presentment or return an indictment to the Court, you will assemble in the courtroom for these purposes. Moreover, each juror is directed to report immediately to the Court any attempt by any person who under any pretense whatsoever addresses or contacts him or her for the purpose of or with the intent to gain any information of any kind concerning the proceedings of the Grand Jury, or to influence a juror in any manner or for any purpose.

The Obligation of Secrecy

33. Your proceedings are secret and must remain secret permanently unless and until the Court decrees otherwise. You cannot relate to your family, to the news or television reporters, or to anyone that which transpired in the Grand Jury room. There are several important reasons for this requirement. A premature disclosure of Grand Jury action may frustrate the ends of justice by giving an opportunity to the person being investigated to escape and become a fugitive or to destroy evidence. Also, if the testimony of a witness is disclosed, the witness may be subject to intimidation, retaliation, bodily injury, or other tampering before testifying at trial. Thirdly, the requirement of secrecy protects an innocent person who may have come under investigation but has been cleared by the actions of the Grand Jury. In the eyes of some, investigation by a Grand Jury alone carries with it a suggestion of guilt. Thus great injury can be done to a person's good name even though the person is not indicted. And fourth, the secrecy requirement helps to protect the members of the grand jury themselves from improper contacts by those under investigation. For all these reasons, therefore, the secrecy requirement is of the utmost importance and must be regarded by you as an absolute duty. If you violate your oath of secrecy, you may be subject to punishment.

34. To insure the secrecy of Grand Jury proceedings, the law provides that only authorized persons may be in the Grand Jury room while evidence is being presented. Only the members of the Grand Jury, the government attorney, the witness under examination, the court reporter, and an interpreter, if required, may be present.

35. If an indictment should ultimately be voted, the presence of unauthorized persons in the Grand Jury room could invalidate it. Particularly remember that no person other than the Grand Jury members themselves or an interpreter necessary to assist a juror who is hearing or speech impaired may be present in the Grand Jury room

while the jurors are deliberating and voting. Although you may disclose matters which occur before the Grand Jury to attorneys for the government for use by such attorneys in the performance of their duties, you may not disclose the contents of your deliberations and the vote of any juror even to government attorneys.

Conclusion

36. The importance of the service you will perform is demonstrated by the very comprehensive and important oath which you took a short while ago. It is an oath rooted in history and thousands of your forebears have taken similar oaths. Therefore, as good citizens, you should be proud to have been selected to assist in the administration of the American system of justice.

37. The government attorney will now accompany you and will assist you in getting organized, after which you may proceed with the business to come before you.

38. The United States Marshal and Deputy United States Marshals will attend you and be subject to your appropriate orders.

39. You may now retire.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 7. The Indictment and the Information

(a) When Used.

(1) *Felony*. An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

(2) *Misdemeanor*. An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).

(b) Waiving Indictment. An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment.

(c) Nature and Contents.

(1) *In General*. The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. For purposes of an indictment referred to in section 3282 of title 18, United States Code, for which the identity of the defendant is unknown, it shall be sufficient for the indictment to describe the defendant as an individual whose name is unknown, but who has a particular DNA profile, as that term is defined in section 3282.

(2) *Citation Error*. Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

(d) *Surplusage*. Upon the defendant's motion, the court may strike surplusage from the indictment or information.

(e) *Amending an Information*. Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.

(f) *Bill of Particulars*. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FILED
05 JUN 29 AM 8:31
LAURA A. BRIGGS
CLERK

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	
	)	
IRVING MATERIALS, INC.,	)	IP 05- 94 -CR-01/M/F
DANIEL C. BUTLER,	)	-02
JOHN HUGGINS,	)	-03
FRED R. "PETE" IRVING, and	)	-04
PRICE IRVING,	)	-05
Defendants.	)	

Violation: 15 U.S.C. § 1

INFORMATION

The United States of America, acting through its attorneys, charges:

I.

DESCRIPTION OF THE OFFENSE

1. IRVING MATERIALS, INC.; DANIEL C. BUTLER; JOHN HUGGINS; FRED R. "PETE" IRVING and PRICE IRVING ("defendants") are hereby made defendants on the charge stated below.

2. Beginning in or about July 2000 and continuing until May 25, 2004, the exact dates being unknown to the United States, the defendants and their co-conspirators entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the prices at which ready mixed concrete was sold in the Indianapolis, Indiana metropolitan area. The combination and conspiracy engaged in by the defendants and their co-conspirators was in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

3. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and their co-conspirators, the substantial terms of which were to suppress and eliminate competition by maintaining and increasing the prices at which ready mixed concrete was sold in the Indianapolis, Indiana metropolitan area.

4. For the purpose of forming and carrying out the charged combination and conspiracy, the defendants and their and co-conspirators did those things that they combined and conspired to do, including, among other things:

(a) engaging in discussions regarding the prices at which each would sell ready mixed concrete;

(b) agreeing during those discussions to specific price increases for ready mixed concrete and to the timing of those price increases;

(c) issuing price announcements and/or price quotations in accordance with the agreements reached;

(d) selling ready mixed concrete pursuant to those agreements at collusive and noncompetitive prices;

(e) accepting payment for ready mixed concrete sold at the agreed-upon collusive and noncompetitive prices; and

(f) authorizing or consenting to the participation of subordinate employees in the conspiracy.

II.

DEFENDANTS AND CO-CONSPIRATORS

5. During the time period covered by this Information, defendant IRVING MATERIALS, INC. was a corporation organized and existing under the laws of Indiana with its principal place of business in Greenfield, Indiana. During the time period covered by this Information, defendant IRVING MATERIALS, INC. was engaged in the business of producing and selling ready mixed concrete in the Indianapolis, Indiana metropolitan area and elsewhere. During certain periods covered by this Information, defendant DANIEL C. BUTLER was the Vice President (Sales) of defendant IRVING MATERIALS, INC. During certain periods covered by this Information, defendant JOHN HUGGINS was the Executive Vice President of defendant IRVING MATERIALS, INC. During the time period covered by this Information, defendant FRED R. "PETE" IRVING was the President and Chief Executive Officer of defendant IRVING MATERIALS, INC. During certain periods covered by this Information, defendant PRICE IRVING was the Vice President (Operations) of defendant IRVING MATERIALS, INC.

6. Various co-conspirators, not made defendants in this Information, participated in the offense charged herein and performed acts and made statements in furtherance thereof.

7. Whenever in this Information reference is made to any act, deed, or transaction of any corporation, the allegation means that the corporation engaged in the act, deed, or transaction by or through its officers, directors, agents, employees, or other representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

III.

TRADE AND COMMERCE

8. Ready mixed concrete is a product whose ingredients include cement, aggregate (sand and gravel), water, and, at times, other additives. Ready mixed concrete is made on demand and, if necessary, is shipped to work sites by concrete mixer trucks. Ready mixed concrete is purchased by do-it-yourself customers, commercial customers, as well as local, state, and federal governments for use in various construction projects, including, but not limited to, sidewalks, driveways, bridges, tunnels, and roads.

9. During the time period covered by this Information, the corporate conspirators purchased substantial quantities of equipment and supplies necessary to the production and distribution of ready mixed concrete, which equipment and supplies were shipped into Indiana from outside Indiana.

10. During the time period covered by this Information, the business activities of the corporate conspirators that are the subject of this Information were within the flow of, and substantially affected, interstate trade and commerce.

IV.

JURISDICTION AND VENUE

11. The combination and conspiracy charged in this Information was carried out, in part, in the Southern District of Indiana within the five years preceding the filing of this Information.

ALL IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1.

Dated:

/s/
R. HEWITT PATE
Assistant Attorney General
Antitrust Division

/s/
MARVIN N. PRICE, JR.
Chief, Midwest Field Office
Antitrust Division

/s/
SCOTT D. HAMMOND
Deputy Assistant Attorney General
Antitrust Division

/s/
FRANK J. VONDRAK

/s/
MARC SIEGEL
Director of Criminal Enforcement
Antitrust Division

/s/
JONATHAN A. EPSTEIN

/s/
MICHAEL W. BOOMGARDEN

Attorneys
Antitrust Division - U.S. Dept. of Justice
209 S. LaSalle Street, Suite 600
Chicago, IL 60604
Telephone: (312) 353-7530
Facsimile: (312) 353-1046

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

Frank J. Vondrak, being first duly sworn, upon his oath deposes and says that he is an attorney for the Antitrust Division, U.S. Department of Justice, that he makes this affidavit for and on behalf of the United States of America and that the allegations in the foregoing Information are true as he is informed and verily believes.

/s/
Frank J. Vondrak
Attorney, Antitrust Division
U.S. Department of Justice

Subscribed and sworn to before me, a notary public, on this 23rd day of June, 2005.

/s/
Evelyn S. Berrien
Notary Public

My Commission Expires:

February 14, 2008

My County of Residence:

Cook County, IL.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. Except as provided in Rule 4.1[1], it must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.

Rule 4. Arrest Warrant or Summons on a Complaint

(a) *Issuance*. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant.

(b) Form

(1) *Warrant*. A warrant must:

(A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;

(B) describe the offense charged in the complaint;

(C) command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer; and

(D) be signed by a judge.

(2) *Summons*. A summons must be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(c) Execution or Service, and Return

(1) *By Whom*. Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

(2) *Location*. A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.

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1 Fed. R. Cr. P. 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means).

(3) Manner

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(4) Return

(A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. The officer may do so by reliable electronic means. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

(B) The person to whom a summons was delivered for service must return it on or before the return day.

(C) At the request of an attorney for the government, a judge may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

(D) Warrant by Telephone or Other Reliable Electronic Means. In accordance with Rule 4.1, a magistrate judge may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

AO 91 (Rev. 08/09) Criminal Complaint

UNITED STATES DISTRICT COURT

for the

Northern District of California

FILED
JUL 12 2011
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States of America
v.
HOMY HONG-MING HSU

Case No. 3 11 70758

Defendant(s)

CRIMINAL COMPLAINT

MEJ

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of Nov. 2001- Sept. 2008 in the county of San Francisco in the Northern District of California, the defendant(s) violated:

Code Section	*Offense Description*
15 U.S.C. s 1	Price-fixing

This criminal complaint is based on these facts:

Please see the attached affidavit of Deborah S. Bond, Special Agent, Federal Bureau of Investigation.

(Approved as to form _____ Jacklin Chou Lem, Trial Attorney)

☑ Continued on the attached sheet.

Complainant's signature

Deborah S. Bond, Special Agent, FBI
Printed name and title

Sworn to before me and signed in my presence.

Date: 7/12/11

Judge's signature

City and state: San Francisco, California

Timothy J Bommer
Printed name and title

AFFIDAVIT OF SPECIAL AGENT DEBORAH BOND IN SUPPORT OF ARREST WARRANT

I, Special Agent Deborah S. Bond, U.S. Department of Justice, Federal Bureau of Investigation ("FBI"), being duly sworn, state as follows:

INTRODUCTION

1. My investigation has revealed that there is probable cause to find that Homy Hong-Ming Hsu (a/k/a/ Homy Hsu) did fix the prices of aftermarket auto lights with his competitors in violation of 15 U.S.C. § 1.

BACKGROUND AND EXPERTISE OF AFFIANT

2. I am an FBI Special Agent in the San Francisco Division of the FBI, 450 Golden Gate Avenue, 13th Floor. I have been assigned to this Division since September 2005. I have approximately twenty-four years of experience working on white collar cases and have almost four years of experience working on antitrust cases. In my tenure as a FBI Special Agent I have investigated numerous criminal cases involving white collar crime, public corruption, heath care fraud, and antitrust.

3. Following my training at the FBI Academy, I received hundreds of hours of training in various aspects of criminal investigation and attended classes and seminars dealing specifically with white collar prosecution.

CHARGE

4. I make this Affidavit in support of an Arrest Warrant and a Criminal Complaint. The information set out below establishes probable cause to believe that:

a. Beginning no later than in or about November 2001 and continuing to until in or about September 2008 ("relevant period"), Homy Hsu and others fixed the prices of aftermarket auto lights.

b. During the relevant period, Homy Hsu was Vice Chairman and head of sales at Eagle Eyes Traffic Industrial Co., Ltd. (hereinafter "Eagle Eyes"), an entity organized and existing under the laws of Taiwan, the Republic of China, and with its principal place of business in Tainan, Taiwan, Republic of China. During the relevant period, Eagle Eyes was a producer of aftermarket auto lights and was engaged in the sale of auto lights in the United States and elsewhere. Aftermarket auto lights are incorporated into an automobile after its original sale, usually as repairs following a collision, but also as accessories and upgrades. Lighting components include items such as headlights, taillights, fog lights, turn signals, brake signals, and reflectors. Aftermarket auto lights are sold through U.S. distributors to aftermarket auto lights wholesalers, retailers, and automotive repair shops.

c. During the relevant period, Homy Hsu participated in a conspiracy with other persons and entities engaged in the manufacture and sale of aftermarket auto lights, the primary purpose of which was to fix the price of aftermarket auto lights sold in the United States and elsewhere. In furtherance of the conspiracy, Homy Hsu engaged in conversations and attended meetings with representatives of other major aftermarket auto lights manufacturing firms. During such meetings and conversations, agreements were reached to fix the price of aftermarket auto lights to be sold in the United States and elsewhere. Homy Hsu was also aware of the existence of the conspiracy among the employees and officers of Eagle Eyes, and that these employees and officers were engaged in conversations and attended meetings, with representatives of other major aftermarket auto lights manufacturing firms. Homy Hsu was aware that during such meetings and

conversations, agreements were reached to fix the price of aftermarket auto lights to be sold in the United States and elsewhere. Homy Hsu was a manager or supervisor in the conspiracy, which involved at least five participants.

f. During the relevant period, aftermarket auto lights sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of aftermarket auto lights, as well as payments for aftermarket auto lights, traveled in interstate and foreign commerce. The business activities of Eagle Eyes and coconspirators in connection with the production and sale of aftermarket auto lights that were the subjects of the conspiracy were within the flow of, and substantially affected, interstate and foreign trade and commerce.

g. Acts in furtherance of this conspiracy were carried out within the Northern District of California within the last five years. Auto lights that were the subjects of the conspiracy were sold by one or more of the conspirators to customers in this District.

CONCLUSION

5. Based on the above information contained in this Affidavit, I believe there is probable cause to believe that Homy Hsu violated 15 U.S.C. § 1.

Deborah S Bond

Deborah S Bond

7/12/11 Sworn to before me

Timothy J Bommer
U.S. Magistrate Judge

2127259

AO 442 (Rev. 01/09) Arrest Warrant

UNITED STATES DISTRICT COURT

for the

Northern District of California

United States of America)
v.)
HOMY HONG-MING HSU) Case No. 3 11 70758
Defendant)

ARREST WARRANT

MEJ

To: Any authorized law enforcement officer

YOU ARE COMMANDED to arrest and bring before a United States magistrate judge without unnecessary delay
(name of person to be arrested) HOMY HONG-MING HSU ,
who is accused of an offense or violation based on the following document filed with the court:

☐ Indictment ☐ Superseding Indictment ☐ Information ☐ Superseding Information ☑ Complaint
☐ Probation Violation Petition ☐ Supervised Release Violation Petition ☐ Violation Notice ☐ Order of the Court

This offense is briefly described as follows:

~~18 U.S.C. Section 201(b) Bribery of Public Officials~~
15 U.S.C. Section 1, Price Fixing

Date: 07/12/2011

Issuing officer's signature

City and state: San Francisco, CA

Timothy J Bommer
U.S. Magistrate Judge
Printed name and title

Return

EXECUTED

This warrant was received on *(date)* 07/12/2011 , and the person was arrested on *(date)* 07/13/201
at *(city and state)* LOSANGELES CA

Date: 07/13/2011

Arresting officer's signature

J. HARKIN DEPUTY U.S. MARSHAL
Printed name and title

Indictments, Informations and Criminal Complaints

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas

(a) Entering a Plea
  (1) *In General*. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.
  (2) *Conditional Plea*. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
  (3) *Nolo Contendere Plea*. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.
  (4) *Failure to Enter a Plea*. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.
  (1) *Advising and Questioning the Defendant*. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
    (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
    (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
    (C) the right to a jury trial;
    (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
    (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
    (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
    (G) the nature of each charge to which the defendant is pleading;
    (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
    (I) any mandatory minimum penalty;
    (J) any applicable forfeiture;
    (K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;
(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a); and
(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) *Ensuring That a Plea Is Voluntary*. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea*. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) *In General*. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
(A) not bring, or will move to dismiss, other charges;
(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or
(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement*. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.
(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.
(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) *Withdrawing a Guilty or Nolo Contendere Plea*. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) *Finality of a Guilty or Nolo Contendere Plea*. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) *Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements*. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) *Recording the Proceedings*. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) *Harmless Error*. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

FILED
U.S. DISTRICT COURT
05 JUN 29 AM 8:31
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	IP 05-94-CR-017/F
v.	)	
	)	
IRVING MATERIALS, INC.,	)	
Defendant.	)	

PLEA AGREEMENT

The United States of America and Irving Materials, Inc. ("defendant"), a corporation organized and existing under the laws of Indiana, hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

RIGHTS OF DEFENDANT

1. The defendant understands its rights:

(a) to be represented by an attorney;

(b) to be charged by Indictment;

(c) to plead not guilty to any criminal charge brought against it;

(d) to have a trial by jury, at which it would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for it to be found guilty;

(e) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;

(f) to appeal its conviction, if it is found guilty; and

(g) to appeal the imposition of sentence against it.

AGREEMENT TO PLEAD GUILTY AND WAIVE CERTAIN RIGHTS

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(f) above. Upon the Court's acceptance of the defendant's guilty plea, the defendant will also knowingly and voluntarily waive its right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742 that challenges the sentence imposed by the Court if that sentence is consistent with or below the sentence recommended in Paragraph 8 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b) - (c). Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive Indictment and plead guilty to a one-count Information to be filed in the United States District Court for the Southern District of Indiana, Indianapolis Division. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by fixing the price at which ready mixed concrete was sold in the Indianapolis, Indiana metropolitan area beginning in or about July 2000 and continuing until May 25, 2004 in violation of the Sherman Act, 15 U.S.C. § 1.

3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below.

FACTUAL BASIS FOR OFFENSE CHARGED

4. Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts:

(a) For purposes of this Plea Agreement, the "Relevant Period" is that period from July, 2000 until May 25, 2004. During the Relevant Period, the defendant was a corporation organized and existing under the laws of Indiana with its principal place of business in Greenfield, Indiana. During the Relevant Period, the defendant was a producer of ready mixed concrete and was engaged in the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area and elsewhere. Ready mixed concrete is a product whose ingredients include cement, aggregate (sand and gravel), water, and, at times, other additives. Ready mixed concrete is made on demand and, if necessary, is shipped to work sites by concrete mixer trucks.

(b) During the Relevant Period, the defendant, by and through certain of its officers and certain employees, including certain high-level personnel of the defendant, participated in a conspiracy with other persons and entities engaged in the manufacture and sale of ready mixed concrete, the primary purpose of which was to fix the price at which ready mixed concrete was sold in the Indianapolis, Indiana metropolitan area. In furtherance of the conspiracy, the defendant, by and through certain of its officers and certain employees, engaged in conversations and attended meetings with representatives of other ready mixed concrete producers in the Indianapolis, Indiana metropolitan area. During such meetings and conversations, agreements were reached to fix the price at which ready mixed concrete was to be sold in the Indianapolis, Indiana metropolitan area.

(c) During the Relevant Period, the corporate conspirators purchased substantial quantities of equipment and supplies necessary to the manufacture and sale of ready mixed concrete, which equipment and supplies were shipped into Indiana from points of origin outside

Indiana. During the Relevant Period, the business activities of the corporate conspirators in connection with the manufacture and sale of ready mixed concrete affected by the conspiracy were within the flow of, and substantially affected, interstate trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the Southern District of Indiana, Indianapolis Division. The conspiratorial meetings and conversations described above took place in the Indianapolis, Indiana metropolitan area, and at least one of these meetings occurred in this District. In addition, sales of ready mixed concrete affected by this conspiracy were made by one or more of the conspirators to customers within the Southern District of Indiana.

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be imposed against it upon conviction for a violation of Section One of the Sherman Act completed prior to June 22, 2004 is a fine in an amount equal to the greatest of:

(a) $10 million (15 U.S.C. § 1);

(b) twice the gross pecuniary gain the conspirators derived from the crime (18 U.S.C. § 3571(c) and (d)); or

(c) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (18 U.S.C. § 3571(c) and (d)).

6. In addition, the defendant understands that:

(a) pursuant to Section 8B1.1 of the United States Sentencing Guidelines ("U.S.S.G.," "Sentencing Guidelines," or "Guidelines"), 18 U.S.C. §3563(b)(2), or 18 U.S.C. §3663(a)(3), the Court may order it to pay restitution to the victims of the offense;

(b) pursuant to 18 U.S.C. § 3013(a)(2)(B), the Court is required to order it to pay a $400.00 special assessment upon conviction for the charged crime; and

(c) pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but no more than five years.

SENTENCING GUIDELINES

7. Defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines at the time of sentencing, along with the other factors set forth in 18 U.S.C. § 3553(a), in imposing sentence. The defendant understands and agrees that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant further understands and agrees that although the Court is not ultimately bound to impose a sentence within the applicable advisory Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). Pursuant to U.S.S.G. § 1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the defendant or to determine the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. § 1B1.8(b).

SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose, a sentence requiring the defendant to pay to the United States a criminal fine of $29.2 million payable in installments as set forth below with interest accruing under 18 U.S.C.§

3612(f)(1)-(2) ("the Recommended Sentence").

(a) The United States and the defendant agree to recommend, in the interest of justice pursuant to 18 U.S.C. § 3572(d)(1) and U.S.S.G. § 8C3.2(b) that the fine be paid in the following installments: within 30 days of imposition of sentence – $5.2 million (plus any accrued interest); at the one-year anniversary of imposition of the sentence ("anniversary") – $4.8 million (plus any accrued interest); at the two-year anniversary – $4.8 million (plus any accrued interest); at the three-year anniversary $4.8 million (plus any accrued interest); at the four-year anniversary $4.8 million (plus any accrued interest) and at the five-year anniversary $4.8 million (plus any accrued interest); provided, however, that the defendant shall have the option at any time before the five-year anniversary of prepaying the remaining balance (plus any accrued interest) then owing on the fine.

(b) The defendant understands that the Court will order it to pay a $400 special assessment pursuant to 18 U.S.C. § 3013(a)(2)(B) in addition to any fine imposed.

(c) Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 12 of this Plea Agreement, and before sentencing in this case, the United States will fully advise the Court of the fact, manner, and extent of the defendant's cooperation and commitment to prospective cooperation with the United States' investigations and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct. The United States and the defendant jointly submit that this Plea Agreement, together with the record that will be created by the United States and the defendant at the plea and sentencing hearings, will provide sufficient information concerning the defendant, the crime charged in this case, and the defendant's role in the crime to enable meaningful exercise of

sentencing authority by the Court under 18 U.S.C. § 3553. The United States and the defendant agree to request jointly that the Court accept the defendant's guilty plea and impose sentence on an expedited schedule as early as the date of arraignment, based upon the record provided by the defendant and the United States, under the provisions of Fed. R. Crim. P. 32(c)(1)(A)(ii) and U.S.S.G. § 6A1.1. The Court's denial of the request to impose sentence on an expedited schedule will not void this Plea Agreement.

(d) The United States contends that had this case gone to trial, the United States would have presented evidence to prove that the gain derived from or the loss resulting from the charged offense is sufficient to justify the Recommended Sentence set forth in this paragraph, pursuant to 18 U.S.C. § 3571(d). For purposes of this plea and sentencing only, the defendant waives its rights to contest this calculation.

9. The United States and the defendant agree that the applicable Sentencing Guidelines fine range exceeds the fine contained in the Recommended Sentence set out in Paragraph 8 above. Subject to the full and continuing cooperation of the defendant, as described in Paragraph 12 of this Plea Agreement and in the Cooperation Agreement filed separately with the Court under seal, and prior to sentencing in this case, the United States will make a motion, pursuant to U.S.S.G. § 8C4.1, for a downward departure from the Sentencing Guidelines fine range and will request that the Court impose the Recommended Sentence set out in Paragraph 8 of this Plea Agreement because of the defendant's substantial assistance in the government's investigations and prosecutions of violations of federal criminal law in the ready mixed concrete industry. The United States and the defendant also agree not to seek or support any sentence outside of the advisory Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this

Plea Agreement. The United States and the defendant further agree that the Recommended Sentence set forth in this Plea Agreement is reasonable.

10. The United States and the defendant understand that the Court retains complete discretion to accept or reject the Recommended Sentence provided for in Paragraph 8 of this Plea Agreement.

(a) If the Court rejects the Recommended Sentence, then the Court shall, on the record and in open court (or, for good cause, *in camera*):

(1) Inform the parties that the Court rejects the Plea Agreement;

(2) Advise the defendant that the Court is not required to follow the Plea Agreement and give the defendant an opportunity to withdraw the plea; and

(3) Advise the defendant that if the plea is not withdrawn, the Court may dispose of the case less favorably toward the defendant than the Plea Agreement contemplated.

(b) If the defendant withdraws its guilty plea, this Plea Agreement, except for Paragraph 10(c), shall be rendered void.

(c) If the defendant withdraws its plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government shall not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if it withdraws its guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any offense referred to in Paragraph 14 below, will be tolled for the period between the date of the signing of the Plea Agreement and the date Defendant withdrew its

guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater.

11. The United States and the defendant agree that restitution is not appropriate in this case because it would unduly complicate or prolong the sentencing process.

DEFENDANT'S COOPERATION

12. The defendant and its subsidiaries in the ready mixed concrete industry will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area, and any litigation or other proceedings arising or resulting from such investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

(a) producing all non-privileged documents, including claimed personal documents, and other materials, wherever located, in the possession, custody, or control of the defendant or any of its subsidiaries, requested by attorneys and agents of the United States in connection with any Federal Proceeding as described above;

(b) using its best efforts to secure the ongoing, full and truthful cooperation, as defined in Paragraph 13 of this Plea Agreement, of the current and former directors, officers, and employees of the defendant or any of its subsidiaries as may be requested by the United States, but excluding Fred R. "Pete" Irving, John Huggins, Daniel C. Butler and Price Irving, including making these persons available, at the defendant's expense, for interviews and the provision of testimony in grand jury, trial and other judicial

proceedings in connection with any Federal Proceeding as described above.

13. The ongoing, full, and truthful cooperation of each person described in Paragraph 12(b) above will be subject to the procedures and protections of this paragraph, and shall include, but not be limited to:

(a) producing all non-privileged documents, including claimed personal documents, and other materials, requested by attorneys and agents of the United States in connection with any Federal Proceeding as described above;

(b) making himself or herself available for interviews, not at the expense of the United States, upon the request of attorneys and agents of the United States in connection with any Federal Proceeding as described above;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding as defined above, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503);

(d) otherwise voluntarily providing the United States with any non-privileged material or information, not requested in (a) - (c) of this paragraph, that he may have that is related to any Federal Proceeding as defined above;

(e) when called upon to do so by the United States in connection with any Federal Proceeding as defined above, testifying in grand jury, trial, and other judicial proceedings, fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), and obstruction of

justice (18 U.S.C. § 1503); and

(f) agreeing that, if the agreement not to prosecute him or her in this Plea Agreement is rendered void under Paragraph 15(c), the statute of limitations will be tolled as to him or her for any Relevant Offense as defined in Paragraph 15(a) will be tolled for the period between the date of the signing of this Plea Agreement and six (6) months after the date that the United States gave notice of its intent to void its obligations to that person under the Plea Agreement.

GOVERNMENT'S AGREEMENT

14. Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the Recommended Sentence, and subject to the cooperation requirements of Paragraph 12 of this Plea Agreement, the United States agrees that it will not bring further criminal charges against the defendant or any of its subsidiaries in the ready mixed concrete industry for any act or offense committed on or before May 25, 2004 that was undertaken in furtherance of an antitrust conspiracy involving the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area. The non-prosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

15. The United States agrees to the following:

(a) Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the Recommended Sentence and subject to the exceptions noted in Paragraph 15(c), the United States will not bring criminal charges against any current or former director, officer, or employee of the defendant or any of its

subsidiaries in the ready mixed concrete industry for any act or offense committed on or before May 25, 2004 and while that person was acting as a director, officer, or employee of the defendant or any of its subsidiaries in the ready mixed concrete industry that was undertaken in furtherance of an antitrust conspiracy involving the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area ("Relevant Offense"), except that the protections granted in this paragraph shall not apply to Fred R. "Pete" Irving, John Huggins, Daniel C. Butler or Price Irving;

(b) Should the United States determine that any current or former director, officer, or employee of the defendant or its subsidiaries may have information relevant to any Federal Proceeding, the United States may request that person's cooperation under the terms of this Plea Agreement by written request delivered to counsel for the individual (with a copy to the undersigned counsel for the defendant) or, if the individual is not known by the United States to be represented, to the undersigned counsel for the defendant;

(c) If any person requested to provide cooperation under Paragraph 15(b) fails to comply with his or her obligations under Paragraph 13, then the terms of this Plea Agreement as they pertain to that person, and the agreement not to prosecute that person granted in this Plea Agreement, shall be rendered void;

(d) Except as provided in Paragraph 15(e), information provided by a person described in Paragraph 15(b) to the United States under the terms of this Plea Agreement pertaining to any Relevant Offense, or any information directly or indirectly derived from that information, may not be used against that person in a criminal case, except in a

prosecution for perjury (18 U.S.C. § 1621), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), or obstruction of justice (18 U.S.C. § 1503);

(e) If any person who provides information to the United States under this Plea Agreement fails to comply fully with his or her obligations under Paragraph 13 of this Plea Agreement, the agreement in Paragraph 15(d) not to use that information or any information directly or indirectly derived from it against that person in a criminal case shall be rendered void;

(f) The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence; and

(g) Documents provided under Paragraphs 12(a) and 13(a) shall be deemed responsive to outstanding grand jury subpoenas issued to the defendant or any of its subsidiaries.

16. The defendant understands that it may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of the defendant and its subsidiaries, including the fact that the United States has moved for a downward departure pursuant to U.S.S.G. § 8C4.1, as a matter for that agency to consider before determining what administrative action, if any, to take.

REPRESENTATION BY COUNSEL

17. The defendant has reviewed all legal and factual aspects of this case with its attorney and is fully satisfied with its attorney's legal representation. The defendant has thoroughly reviewed this Plea Agreement with its attorney and has received satisfactory explanations from its attorney concerning each paragraph of this Plea Agreement and alternatives available to the defendant other than entering into this Plea Agreement. After conferring with its attorney and considering all available alternatives, the defendant has made a knowing and voluntary decision to enter into this Plea Agreement.

VOLUNTARY PLEA

18. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement and the Cooperation Agreement filed separately with the Court under seal. The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

19. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant or any of its subsidiaries has failed to provide full and truthful cooperation, as described in Paragraph 12 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States may notify counsel for the defendant in writing by personal or overnight delivery or facsimile transmission and may also notify its counsel by telephone of its intention to void its

obligations under this Plea Agreement (except its obligations under this paragraph), and the defendant and its subsidiaries shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant may seek court review of any determination made by the United States under this paragraph to void any of its obligations under the Plea Agreement. The defendant and its subsidiaries agree that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant or its subsidiaries for any offense referred to in Paragraph 14 of this Plea Agreement, the statute of limitations period for such offense will be tolled for the period between the date of the signing of the Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement or the date that the court rules that this Plea Agreement is null and void, whichever is later.

20. The defendant understands and agrees that in any further prosecution of it or its subsidiaries resulting from the release of the United States from its obligations under this Plea Agreement based on the defendant's or its subsidiaries' violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by it, its subsidiaries or current or former directors, officers or employees of it or its subsidiaries to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against it or its subsidiaries in any such further prosecution. In addition, the defendant unconditionally waives its right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

ENTIRETY OF AGREEMENT

21. This Plea Agreement and the Cooperation Agreement, filed separately with the Court under seal, constitute the entire agreement between the United States and the defendant concerning the disposition of the criminal charge in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

22. The undersigned is authorized to enter this Plea Agreement on behalf of the defendant as evidenced by the Resolution of the Board of Directors of the defendant attached hereto and incorporated by reference in this Plea Agreement. *See* Attachment A.

23. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

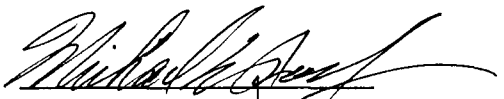
DATED: June 22, 2005 Respectfully submitted,

BY: _____
EARL G. BRINKER
Secretary
Irving Materials, Inc.

BY: _____
FRANK J. VONDRAK

_____
SUSAN B. RIVAS
Counsel for Irving Materials, Inc.

_____
JONATHAN A. EPSTEIN



MICHAEL W. BOOMGARDEN

Attorneys,
U.S. Department of Justice
Antitrust Division
209 S. LaSalle #600
Chicago, Illinois 60604
Tel: 312.353.7530
Fax: 312.353.1046

Attachment A

Secretary Certificate

Resolutions of the Board of Directors of Irving Materials, Inc.

The undersigned certifies that the Board of Directors of Irving Materials, Inc. ("IMI") unanimously adopted the following resolutions on May 19, 2005:

RESOLVED, the execution, delivery, and performance of the Plea Agreement between IMI and the United States Department of Justice, in substantially the form presented to this meeting ("Plea Agreement"), is hereby approved;

RESOLVED, that any duly elected officer of IMI (collectively, "Authorized Officer"), is hereby authorized and directed to execute and deliver the Plea Agreement in the name and on behalf of IMI;

RESOLVED, that any Authorized Officer or other designated corporate representative is hereby authorized to represent IMI at any hearing in order to waive certain rights of IMI and to enter a plea, all in accordance with the provisions of the Plea Agreement; and

RESOLVED, that any Authorized Officer is hereby authorized and empowered to take any and all actions required or appropriate in order to carry out the intent and purpose of the preceding resolutions.

Date: June 16, 2005

Earl G. Brinker, Secretary

INDY 1551292v.1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FILED
IN DISTRICT COURT
INDIANAPOLIS DIVISION
05 JUN 29 AM 8:34
LAURA A. BRIGGS
CLERK

UNITED STATES OF AMERICA,	)	
	)	IP 05-94 -CR-04 M/F
v.	)	
	)	
FRED R. "PETE" IRVING,	)	
Defendant.	)	

PLEA AGREEMENT

The United States of America and Fred R. "Pete" Irving ("defendant") hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

RIGHTS OF DEFENDANT

1. The defendant understands his rights:

(a) to be represented by an attorney;

(b) to be charged by Indictment;

(c) to plead not guilty to any criminal charge brought against him;

(d) to have a trial by jury, at which he would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for him to be found guilty;

(e) to confront and cross-examine witnesses against him and to subpoena witnesses in his defense at trial;

(f) not to be compelled to incriminate himself;

(g) to appeal his conviction, if he is found guilty; and

(h) to appeal the imposition of sentence against him.

AGREEMENT TO PLEAD GUILTY AND WAIVE CERTAIN RIGHTS

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(g) above. The defendant also knowingly and voluntarily waives his right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2241 or 2255, that challenges the sentence imposed by the Court if that sentence is consistent with or below the recommended sentence in Paragraph 9 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b) - (c). Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty to a one-count Information to be filed in the United States District Court for the Southern District of Indiana, Indianapolis Division. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by fixing the price at which ready mixed concrete was sold in the Indianapolis, Indiana metropolitan area beginning in or before July, 2000 and continuing until May 25, 2004 in violation of the Sherman Act, 15 U.S.C. § 1.

3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below. The United States agrees that it will stipulate to the release of the defendant on his personal recognizance, pursuant to 18 U.S.C. § 3142, pending the sentencing hearing in this case.

FACTUAL BASIS FOR OFFENSE CHARGED

4. Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts:

(a) For purposes of this Plea Agreement, the "Relevant Period" is that period from July, 2000 until May 25, 2004. During the Relevant Period, the defendant was the President and principal shareholder of Irving Materials, Inc. ("IMI"), an entity organized and existing under the laws of Indiana with its principal place of business in Greenfield, Indiana. During the Relevant Period, IMI was a producer of ready mixed concrete and was engaged in the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area and elsewhere. Ready mixed concrete is a product whose ingredients include cement, aggregate (sand and gravel), water, and, at times, other additives. Ready mixed concrete is made on demand and, if necessary, is shipped to work sites by concrete mixer trucks. During the Relevant Period, IMI's sales of ready mixed concrete to customers in the Indianapolis, Indiana metropolitan area was over $100 million.

(b) During the Relevant Period, the defendant participated in a conspiracy with other persons and entities engaged in the manufacture and sale of ready mixed concrete, the primary purpose of which was to fix the price of ready mixed concrete sold in the Indianapolis, Indiana metropolitan area. In furtherance of the conspiracy, the defendant encouraged lower-level employees of IMI to engage in conversations and attend meetings with representatives of other ready mixed concrete producers in the Indianapolis, Indiana metropolitan area and/or approved of such conversations and meetings. During such meetings and conversations, agreements were reached to fix the price at which ready mixed concrete was to be sold in the

Indianapolis, Indiana metropolitan area.

(c) During the Relevant Period, the corporate conspirators purchased substantial quantities of equipment and supplies necessary to the manufacture and distribution of ready mixed concrete which equipment and supplies were shipped into Indiana from points of origin outside Indiana. During the Relevant Period, the business activities of the corporate conspirators in connection with the manufacture and sale of ready mixed concrete affected by the conspiracy were within the flow of, and substantially affected, interstate trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the Southern District of Indiana. The conspiratorial meetings and conversations described above took place in the Indianapolis, Indiana metropolitan area, and at least one of these meetings occurred in this District. In addition, sales of ready mixed concrete affected by this conspiracy were made by one or more of the conspirators to customers within the Southern District of Indiana.

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be imposed against him upon conviction for a violation of Section One of the Sherman Act completed prior to June 22, 2004 is:

(a) a term of imprisonment for three (3) years (15 U.S.C. § 1);

(b) a fine in an amount equal to the greatest of (1) $350,000, (2) twice the gross pecuniary gain the conspirators derived from the crime, or (3) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (15 U.S.C. § 1; 18 U.S.C. § 3571(b) and (d)); and

(c) a term of supervised release of one (1) year following any term of

imprisonment. If the defendant violates any condition of supervised release, the defendant could be imprisoned for the entire term of supervised release (18 U.S.C. § 3559(a)(5); 18 U.S.C. § 3583(b)(3) and (e)(3); and Section 5D1.2(a)(3) of the United States Sentencing Guidelines ("U.S.S.G.," "Guidelines," or "Sentencing Guidelines")).

6. In addition, the defendant understands that:

(a) pursuant to U.S.S.G. § 5E1.1, the Court may order him to pay restitution to the victims of the offense; and

(b) pursuant to 18 U.S.C. § 3013(a)(2)(A), the Court is required to order the defendant to pay a $100.00 special assessment upon conviction for the charged crime.

SENTENCING GUIDELINES

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on May 25, 2004, along with the other factors set forth in 18 U.S.C. § 3553(a), in imposing sentence. The defendant understands and agrees that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant further understands and agrees that although the Court is not ultimately bound to impose a sentence within the applicable advisory Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). Pursuant to U.S.S.G. § 1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the defendant or to determine the defendant's applicable Guidelines range, except

to the extent provided in U.S.S.G. § 1B1.8(b).

8. The United States and the defendant agree that the Guidelines calculations relevant to the defendant are as follows: Under U.S.S.G. § 2R1.1, the Base Offense Level is 10. Because the volume of commerce attributable to the defendant is over $100 million, a seven-level increase under U.S.S.G. § 2R1.1(b)(2)(G) is appropriate. The defendant is entitled to a three-level decrease under U.S.S.G. § 3E1.1(a) & (b) for Acceptance of Responsibility. The United States and the defendant agree that no other adjustments under the Sentencing Guidelines are warranted in this case. The Final Offense level is, therefore, Level 14. The Guidelines fine would be $350,000 pursuant to U.S.S.G. § 2R1.1(c)(1). Pursuant to Paragraph 10 of this Plea Agreement, the United States will file a motion for a downward departure under U.S.S.G. § 5K1.1 based on the defendant's substantial assistance to the United States in its investigations, recommending a two-level reduction in the Final Offense Level to Level 12 and a fine of $200,000. Pursuant to U.S.S.G. § 5C1.1(d)(2), the defendant is eligible for a sentence that substitutes home detention for one-half the minimum term of imprisonment. The sentencing range for an Offense Level 12 with a Criminal History Category I is 10 to 16 months.

SENTENCING AGREEMENT

9. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose, a sentence requiring the defendant to pay to the United States a criminal fine of $200,000, payable in full before the fifteenth (15th) day after the date of judgment; and to serve a period of incarceration of five months; a period of home confinement of five months; and no period of supervised release ("Recommended Sentence"). The United States and the defendant

agree that other than the possible motion by the United States for a downward departure pursuant to U.S.S.G. § 5K1.1 as set forth in Paragraph 10 of this Plea Agreement, there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the United States Sentencing Commission in formulating the Sentencing Guidelines that should result in a sentence outside of the advisory Guidelines range. The United States and the defendant also agree not to seek or support any sentence outside of the advisory Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The United States and the defendant further agree that the Recommended Sentence set forth in this Plea Agreement is reasonable. The United States and the defendant agree that under U.S.S.G. § 5E1.1(b)(2), restitution is not appropriate in this case because it would complicate or prolong the sentencing process. The defendant understands that the Court will order him to pay a $100.00 special assessment pursuant to 18 U.S.C. § 3013(a)(2)(A) in addition to any fine imposed.

10. Subject to the full and continuing cooperation of the defendant, as described in Paragraph 13 of this Plea Agreement and in the Cooperation Agreement filed separately with the Court, and prior to sentencing in this case, the United States agrees that it will make a motion, pursuant to U.S.S.G. § 5K1.1, for a downward departure from the Guidelines sentence in this case and will request that the Court impose the fine and term of imprisonment contained in the Recommended Sentence set out in Paragraph 9 of this Plea Agreement because of the defendant's substantial assistance in the government's investigations and prosecutions of violations of federal criminal law in the ready mixed concrete industry. Both the United States and the defendant agree that a two-level decrease pursuant to U.S.S.G. § 5K1.1 in the offense

level and a departure to a fine of $200,000 are appropriate in this case.

11. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 13 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the United States Probation Office of the fact, manner, and extent of the defendant's cooperation and his commitment to prospective cooperation with the United States' investigations and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct. To enable the Court to have the benefit of all relevant sentencing information, the United States may request that sentencing be postponed until his cooperation is complete. The defendant will not oppose that request provided that such postponement is of a reasonable duration.

12. The United States and the defendant understand that the Court retains complete discretion to accept or reject the Recommended Sentence provided for in paragraph 9 of this Plea Agreement.

(a) If the Court rejects the Recommended Sentence, then the Court shall, on the record and in open court (or, for good cause, *in camera*):

(1) Inform the parties that the Court rejects the Plea Agreement;

(2) Advise the defendant that the Court is not required to follow the Plea Agreement and give the defendant an opportunity to withdraw the plea; and

(3) Advise the defendant that if the plea is not withdrawn, the Court may dispose of the case less favorably toward the defendant than the Plea Agreement contemplated.

(b) If the defendant withdraws his guilty plea, this Plea Agreement, except for paragraph 12(c), shall be rendered void.

(c) If the defendant withdraws his plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government shall not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if he withdraws his guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any Relevant Offense, as defined in Paragraph 14 below, will be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew his guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater.

DEFENDANT'S COOPERATION

13. The defendant will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area, and any litigation or other proceedings arising or resulting from such investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

(a) producing all non-privileged documents, including claimed personal documents, and other materials, wherever located, in the possession, custody, or control of the defendant, requested by attorneys and agents of the United States;

(b) making himself available for interviews, not at the expense of the United States, upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding as defined above, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503);

(d) otherwise voluntarily providing the United States with any non-privileged material or information, not requested in (a) - (c) of this paragraph, that he may have that is related to any Federal Proceeding as defined above; and

(e) when called upon to do so by the United States in connection with any Federal Proceeding as defined above, testifying in grand jury, trial, and other judicial proceedings, fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), and obstruction of justice (18 U.S.C. § 1503).

GOVERNMENT'S AGREEMENT

14. Subject to the full, truthful, and continuing cooperation of the defendant, as described in Paragraph 13 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the Recommended Sentence, the United States will not bring further criminal charges against the defendant for any act or offense committed on or before May 25, 2004 that was undertaken in furtherance of an antitrust conspiracy involving the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area ("Relevant Offense"). The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to

any crime of violence.

15. The defendant understands that he may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of the defendant as a matter for that agency to consider before determining what administrative action, if any, to take.

REPRESENTATION BY COUNSEL

16. The defendant has reviewed all legal and factual aspects of this case with his attorneys and is fully satisfied with his attorneys' legal representation. The defendant has thoroughly reviewed this Plea Agreement with his attorneys and has received satisfactory explanations from his attorneys concerning each paragraph of this Plea Agreement and alternatives available to the defendant other than entering into this Plea Agreement. After conferring with his attorneys and considering all available alternatives, the defendant has made a knowing and voluntary decision to enter into this Plea Agreement.

VOLUNTARY PLEA

17. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement and the Cooperation Agreement filed separately with the Court under seal. The United States has made

no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

18. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant has failed to provide full and truthful cooperation, as described in Paragraph 13 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States may notify counsel for the defendant in writing by personal or overnight delivery or facsimile transmission and may also notify his counsel by telephone of its intention to void its obligations under this Plea Agreement (except its obligations under this paragraph), and the defendant shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant may seek court review of any determination made by the United States under this paragraph to void any of its obligations under the Plea Agreement. The defendant agrees that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant for any Relevant Offense, the statute of limitations will be tolled for the period between the date of the signing of the Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement or the date that the court rules that this Plea Agreement is null and void, whichever is later.

19. The defendant understands and agrees that in any further prosecution of him resulting from the release of the United States from its obligations under this Plea Agreement

based on the defendant's violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by him to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against him in any such further prosecution. In addition, the defendant unconditionally waives his right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

ENTIRETY OF AGREEMENT

20. This Plea Agreement and the Cooperation Agreement, filed separately with the Court under seal, constitute the entire agreement between the United States and the defendant concerning the disposition of the criminal charge in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

21. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

DATED: 6-14-05

Respectfully submitted,

BY: _____
FRED R. "PETE" IRVING
Defendant

BY: _____
FRANK J. VONDRAK

J. RICHARD KIEFER
Counsel for Fred R. "Pete" Irving

JONATHAN A. EPSTEIN

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Sentencing

IMPOSITION OF A SENTENCE

18 U.S.C. § 3553

(a) *Factors To Be Considered in Imposing a Sentence*. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code,[1] subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);[2] and

(ii) that, except as provided in section 3742(g),[3] are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

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1 28 U.S.C. § 994(a) requires the U.S. Sentencing Commission to promulgate guidelines and policy statements in connection with the sentencing of federal crimes.

2 28 U.S.C. § 994(p) permits the U.S. Sentencing Commission to promulgate amendments to the existing guidelines and to any prior amendments that are not yet effective.

3 18 U.S.C. 3742(g) governs sentencing upon remand.

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) *Application of Guidelines in Imposing a Sentence*.—

(1) *In general*. Except as provided in paragraph (2),[4] the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

[*Remainder of Section 3553 omitted*]

4 Dealing with child crimes and sexual offenses.

IMPOSITION OF A SENTENCE OF FINE AND RELATED MATTERS

18 U.S.C. § 3572

(a) *Factors To Be Considered*. In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—

(1) the defendant's income, earning capacity, and financial resources;
(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
(3) any pecuniary loss inflicted upon others as a result of the offense;
(4) whether restitution is ordered or made and the amount of such restitution;
(5) the need to deprive the defendant of illegally obtained gains from the offense;
(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;
(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and
(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

[*Remainder of Section 3572 omitted*]

PROBATION

Note: A corporation as well as an individual may be sentenced to probation.

18 U.S. Code § 3561 - Sentence of probation

(a) *In General*. A defendant who has been found guilty of an offense may be sentenced to a term of probation unless [*exceptions omitted—do not apply to Sherman Act § 1 offenses*]

(b) *Domestic Violence Offenders*. [*omitted*]

(c) *Authorized Terms*. The authorized terms of probation are—

(1) for a felony, not less than one nor more than five years;

(2) for a misdemeanor, not more than five years; and

(3) for an infraction, not more than one year.

18 U.S. Code § 3562 - Imposition of a sentence of probation

(a) *Factors To Be Considered in Imposing a Term of Probation*. The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.

(b) *Effect of Finality of Judgment*. Notwithstanding the fact that a sentence of probation can subsequently be—

(1) modified or revoked pursuant to the provisions of section 3564 or 3565;

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

18 U.S. Code § 3563 - Conditions of probation

(a) *Mandatory Conditions*. The court shall provide, as an explicit condition of a sentence of probation—

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation;

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2) or (b)(12), unless the court has imposed a fine under this chapter, or unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under subsection (b);

(3) – (9) [*omitted*]

(b) *Discretionary Conditions*. The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

. . .

(2) make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A));

. . .

(12) work in community service as directed by the court;

. . .

(22) satisfy such other conditions as the court may impose or;

. . .

(c) *Modifications of Conditions*. The court may modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the conditions of probation.

(d) *Written Statement of Conditions.* The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(e) *Results of Drug Testing* [*omitted*]

18 U.S. Code § 3564 - Running of a term of probation

[*Omitted*]

18 U.S. Code § 3565 - Revocation of probation

(a) *Continuation or Revocation*. If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—

(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

(2) revoke the sentence of probation and resentence the defendant under subchapter A.

(b) *Mandatory Revocation for Possession of Controlled Substance or Firearm or Refusal To Comply With Drug Testing* [*omitted*]

(c) *Delayed Revocation* [*omitted*]

PART R — ANTITRUST OFFENSES

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

(a) Base Offense Level: **12**

(b) Specific Offense Characteristics

(1) If the conduct involved participation in an agreement to submit non-competitive bids, increase by **1** level.

(2) If the volume of commerce attributable to the defendant was more than $1,000,000, adjust the offense level as follows:

	VOLUME OF COMMERCE (APPLY THE GREATEST)	ADJUSTMENT TO OFFENSE LEVEL
(A)	More than $1,000,000	add **2**
(B)	More than $10,000,000	add **4**
(C)	More than $50,000,000	add **6**
(D)	More than $100,000,000	add **8**
(E)	More than $300,000,000	add **10**
(F)	More than $600,000,000	add **12**
(G)	More than $1,200,000,000	add **14**
(H)	More than $1,850,000,000	add **16**.

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

(c) Special Instruction for Fines

(1) For an individual, the guideline fine range shall be from one to five percent of the volume of commerce, but not less than $20,000.

(d) Special Instructions for Fines — Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce.

(2) When applying §8C2.6 (Minimum and Maximum Multipliers), neither the minimum nor maximum multiplier shall be less than 0.75.

(3) In a bid-rigging case in which the organization submitted one or more complementary bids, use as the organization's volume of commerce the greater of (A) the volume of commerce done by the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy.

Commentary

Statutory Provisions: 15 U.S.C. §§ 1, 3(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Application of Chapter Three (Adjustments).**—Sections 3B1.1 (Aggravating Role), 3B1.2 (Mitigating Role), 3B1.3 (Abuse of Position of Trust or Use of Special Skill), and 3C1.1 (Obstructing or Impeding the Administration of Justice) may be relevant in determining the seriousness of the defendant's offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, the 4-level increase at §3B1.1(a) should be applied to reflect the defendant's aggravated role in the offense. For purposes of applying §3B1.2, an individual defendant should be considered for a mitigating role adjustment only if he were responsible in some minor way for his firm's participation in the conspiracy.

2. **Considerations in Setting Fine for Individuals.**—In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, the defendant's role, and the degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement). If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally as burdensome as a fine.

3. The fine for an organization is determined by applying Chapter Eight (Sentencing of Organizations). In selecting a fine for an organization within the guideline fine range, the court should consider both the gain to the organization from the offense and the loss caused by the organization. It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range.

4. Another consideration in setting the fine is that the average level of mark-up due to price-fixing may tend to decline with the volume of commerce involved.

5. It is the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.

6. Understatement of seriousness is especially likely in cases involving complementary bids. If, for example, the defendant participated in an agreement not to submit a bid, or to submit an unreasonably high bid, on one occasion, in exchange for his being allowed to win a subsequent bid that

he did not in fact win, his volume of commerce would be zero, although he would have contributed to harm that possibly was quite substantial. The court should consider sentences near the top of the guideline range in such cases.

7. In the case of a defendant with previous antitrust convictions, a sentence at the maximum of the applicable guideline range, or an upward departure, may be warranted. *See* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Background: These guidelines apply to violations of the antitrust laws. Although they are not unlawful in all countries, there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm. There is no consensus, however, about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.

The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual competitive effect.

Under the guidelines, prison terms for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice. Absent adjustments, the guidelines require some period of confinement in the great majority of cases that are prosecuted, including all bid-rigging cases. The court will have the discretion to impose considerably longer sentences within the guideline ranges. Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, in very few cases will the guidelines not require that some confinement be imposed. Adjustments will not affect the level of fines.

Tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun. The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute. The limited empirical data available as to pre-guidelines practice showed that fines increased with the volume of commerce and the term of imprisonment probably did as well.

The Commission believes that the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases. For this reason, and consistent with pre-guidelines practice, the Commission has specified a 1-level increase for bid-rigging.

Substantial fines are an essential part of the sentence. For an individual, the guideline fine range is from one to five percent of the volume of commerce, but not less than $20,000. For an organization, the guideline fine range is determined under Chapter Eight (Sentencing of Organizations), but pursuant to subsection (d)(2), the minimum multiplier is at least 0.75. This multiplier, which requires a minimum fine of 15 percent of the volume of commerce for the least serious case, was selected to provide an effective deterrent to antitrust offenses. At the same time, this minimum multiplier maintains incentives for desired organizational behavior. Because the Department of Justice has a well-established amnesty program for organizations that self-report antitrust offenses, no lower minimum multiplier is needed as an incentive for self-reporting. A minimum multiplier of at least 0.75 ensures that fines imposed in antitrust cases will exceed the average monopoly overcharge.

The Commission believes that most antitrust defendants have the resources and earning capacity to pay the fines called for by this guideline, at least over time on an installment basis.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 211 and 303); November 1, 1991 (amendments 377 and 422); November 1, 2003 (amendment 661); November 1, 2004 (amendment 674); November 1, 2005 (amendment 678); November 1, 2015 (amendment 791); November 1, 2018 (amendment 813).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 1:15-CR-00098
	)	
	)	
v.	)	
	)	Violation: 15 U.S.C. § 1
KAYABA INDUSTRY CO., LTD d/b/a KYB COPORATION,	)	Judge Michael R. Barrett
	)	
Defendant.	)	
	)	

UNITED STATES SENTENCING MEMORANDUM AND MOTION FOR A DOWNWARD DEPARTURE PURSUANT TO UNITED STATES SENTENCING GUIDELINES § 8C4.1

Kayaba Industry Co., Ltd d/b/a KYB Corporation ("KYB" or the "Defendant") is scheduled to appear before this Court for an initial hearing, change-of-plea hearing, and sentencing on October 29, 2015, at 9:30 a.m. The Defendant is charged with violating the Sherman Act, 15 U.S.C. § 1. The United States submits this Sentencing Memorandum to provide the Court with sufficient information that it may meaningfully exercise its sentencing authority under 18 U.S.C. §§ 3553 and 3572.

The United States also hereby moves for a downward departure pursuant to United States Sentencing Guidelines ("U.S.S.G.," "Sentencing Guidelines," or the "Guidelines") § 8C4.1 because the Defendant has provided substantial assistance to the government in its on-going investigation of Sherman Act violations by other companies and individuals in the shock absorber industry.

In support of both this Sentencing Memorandum and this Motion for a Downward Departure, the United States also submits, under seal, Attachment A ("Attachment A").

The United States and the Defendant jointly recommend that the Court sentence the Defendant to pay to the United States a $62 million criminal fine, payable in full before the fifteenth day after the date of judgment, no order of restitution, no term of probation, and to pay a $400 special assessment. This is a joint recommendation under Fed. R. Crim. P. 11(c)(1)(C). *See* Plea Agreement, ¶ 9, Docket No. 9.

I. BACKGROUND

The Sherman Act makes it illegal for competitors to eliminate competition among themselves by allocating markets, rigging bids, and fixing prices. The subversion and elimination of competition for business, whether done through agreement to divide up business by allocating customers or markets; fix prices charged to customers; or rig bids submitted to customers, typically results in the customer paying more than it should have for the work done or the product supplied. The Defendant has admitted that, through its employees, it conspired with other shock absorbers manufacturers to do these things made illegal by the Sherman Act.

Shock absorbers are part of the suspension system on automobiles and motorcycles. They absorb and dissipate energy to help cushion vehicles on uneven roads leading to improved ride quality and vehicle handling. Shock absorbers are also called dampers and on motorcycles are referred to as front forks and rear cushions.

On September 16, 2015, the United States filed a one-count criminal Information charging the Defendant with participating in a combination and conspiracy to suppress and eliminate competition in the automotive parts industry by agreeing to allocate markets, rig bids for, and to fix, stabilize, and maintain the prices of shock absorbers sold to Fuji Heavy Industries Ltd. (manufacturer of Subaru vehicles), Honda Motor Co., Ltd., Kawasaki Heavy Industries, Ltd., Nissan Motor Company Ltd., Suzuki Motor Corporation, and Toyota Motor Company, and

certain of their subsidiaries (collectively, the "Vehicle Manufacturers"), in violation of the Sherman Act, 15 U.S.C. § 1. *See* Docket No. 2.

II. SUMMARY OF THE OFFENSE

During the period charged in the Information, from at least as early as the mid-1990s and continuing until as late as December 2012 (the "Charging Period"), Defendant was a corporation organized and existing under the laws of Japan with its principal place of business in Tokyo, Japan. During the Charging Period, the Defendant and certain of its subsidiaries were engaged in the manufacture and sale of shock absorbers to Vehicle Manufacturers in the United States and elsewhere for installation in vehicles manufactured and sold in the United States and elsewhere. During the Charging Period, one of the Defendant's subsidiaries was KYB Americas Corporation, which has headquarters in Franklin, Indiana, and plants, offices, and facilities in Indiana, Illinois, Michigan, and Kansas.

During the Charging Period, Defendant and its co-conspirators entered into and engaged in a combination and conspiracy to suppress and eliminate competition in the automotive parts industry by agreeing to allocate markets, rig bids for, and to fix, stabilize, and maintain the prices of shock absorbers sold to Vehicle Manufacturers in the United States and elsewhere. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among Defendant and its co-conspirators. In furtherance of the conspiracy, the Defendant, through its managers and employees, engaged in discussions and attended meetings with co-conspirators employed by other manufacturers of shock absorbers. During these discussions and meetings, agreements were reached to rig bids for, and to fix, stabilize, and maintain the prices of shock absorbers sold to Vehicle Manufacturers in the United States and elsewhere. The Defendant has fully cooperated in the United States' investigation and entered into a plea agreement with the United States.

III. UNITED STATES' FINE METHODOLOGY AND FACTORS TO CONSIDER IN DETERMINING THE SENTENCE

The jointly recommended criminal fine was calculated using sales figures submitted to the United States by the Defendant and the victims of the conspiracy. Based on these sales figures, the United States calculates the volume of commerce under U.S.S.G. § 2R1.1(d), adjusted to reflect information provided to the United States by the Defendant pursuant to U.S.S.G. § 1B1.8, to total approximately $324 million. The affected volume of commerce consists of sales of shock absorbers in the United States by the Defendant's U.S. subsidiary.

A. Sentencing Guidelines Fine Calculation

In determining and imposing sentence the Court must consider the kinds of sentence established by the advisory Sentencing Guidelines, 18 U.S.C. § 3553(a)(4). The Sentencing Guidelines procedure for calculating the Guidelines fine range for a corporation charged with an antitrust offense is set forth below. Organizations, such as the Defendant, are sentenced pursuant to Chapter 8 of the Sentencing Guidelines. In the case of antitrust violations, in addition to the provisions of Chapter 8, special instructions with respect to determining fines for organizations are found in the Antitrust Guideline, U.S.S.G. § 2R1.1.

Under the Sentencing Guidelines, the first step in determining a defendant's fine range is to determine the base fine. The controlling Guideline applicable to the count charged is U.S.S.G. § 2R1.1(d)(1), pursuant to which the base fine is 20% of the approximately $324 million in affected commerce, or approximately $64.8 million.

The next step is to determine the culpability score for a defendant. The base culpability score is 5. *See* U.S.S.G. § 8C2.5(a). The Defendant is a corporation with more than 5,000 employees, and the offense involved certain high-level personnel of the Defendant, which adjusts the culpability score upward by 5 points. *See* U.S.S.G. § 8C2.5(b)(1). The Defendant fully

cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, which adjusts the culpability score downward by 2 points. *See* U.S.S.G. § 8C2.5(g)(2). The resulting total culpability score is 8.

The culpability score is then used to determine the minimum and maximum multipliers. A culpability score of 8 corresponds to a minimum multiplier of 1.60 and a maximum multiplier of 3.20. *See* U.S.S.G. § 8C2.6.

Applying the multipliers to the base fine of $64.8 million yields a Guidelines fine range for the Defendant of $103.68 million to $207.36 million. *See* U.S.S.G. § 8C2.7.

B. Statutory Factors to Consider at Sentencing

In addition to the advisory Sentencing Guidelines, the Court must consider the other factors set forth in 18 U.S.C. §§ 3553(a) and 3572 in determining and imposing sentence. The Court's sentence must be sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). Because the Defendant in this case is a corporation, not all of the statutory factors apply. Below, the factors that are most relevant to the sentencing of this Defendant are highlighted.

1. Relevant Section 3553 Factors

a. The Seriousness of the Offense (3553(a)(2)(A))

Antitrust conspiracies are by their very nature serious offenses. Antitrust crimes strike a blow to the heart of the nation's economy—competition. When competition is eliminated, as it was here, consumers are likely to pay higher prices for goods and services. According to the background comments in the Antitrust Guideline, "there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm." U.S.S.G. § 2R1.1, commentary (backg'd.).

b. The History, Characteristics, and Cooperation of the Defendant (3553(a)(1))

Prior to this offense, the Defendant had not been charged with any federal crime. The Defendant's cooperation in the United States' investigation was timely and complete, and the Defendant has clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct. Very shortly after the Defendant was notified of the government's investigation, it agreed to cooperate in the investigation and plead guilty to an antitrust violation. KYB then conducted a wide-ranging internal investigation designed to uncover the extent of its involvement in the antitrust crime under investigation. During the course of that investigation, the Defendant uncovered relevant documents located in the United States and elsewhere, and then quickly produced those documents to the United States, with translations where appropriate. The Defendant interviewed employees and then proffered the results of those interviews to the United States. At the request of the United States, the Defendant made its employees, including many who were outside of the United States and thus beyond the reach of grand jury subpoena, available for interviews. The Defendant also provided translators for those interviews.

The Defendant has agreed to continue cooperating in the United States' investigation. *See also* Attachment A.

c. Deterrence and Protecting the Public from Further Crimes of the Defendant (3553(a)(2)(B) and (C))

The large criminal fine of $62 million recommended in this case provides adequate deterrence to criminal conduct. The Defendant has clearly accepted responsibility for its criminal conduct. Additionally, as discussed below, the Defendant has implemented a new compliance policy to educate its employees to ensure that the company does not violate the antitrust laws in the future.

2. Relevant Section 3572 Factors

a. Preventing Recurrence of the Offense—Compliance (3572 (a)(8))

From the moment KYB received notification of the government's investigation, management committed to instituting policies that would ensure that it would never again violate the antitrust laws. Direction for this change came straight from the top—KYB's president, Masao Usui. He directed a full and complete investigation be conducted and ordered all employees to cooperate fully and truthfully with the investigation.

Simultaneously, a comprehensive and innovative compliance policy was conceived and implemented. That policy, at the direction of the Defendant's senior management, sought to change the culture of the company to prevent recurrence of the offense. KYB's compliance policy has the hallmarks of an effective compliance policy including direction from top management at the company, training, anonymous reporting, proactive monitoring and auditing, and provided for discipline of employees who violated the policy. While not exhaustive, the following is a description of some of the highlights of KYB's compliance program.

The new policy required training of senior management and all sales personnel. In addition to classroom training, it provided one-on-one training for personnel with jobs, such as sales people, where there is a high risk of antitrust crimes. The effectiveness of the training was measured by testing employees' awareness of antitrust issues before and after the training. The policy requires prior approval, where possible, of all contacts with competitors and reporting of all contacts with competitors. These reports are audited by in-house counsel. Under the new compliance policy, sales personnel must certify that all prices were independently determined and that they did not exchange information or conspire with competitors when determining the price. An anonymous hotline was set up so that employees can report possible violations of the

antitrust laws. Senior management's efforts set the tone at the top and made compliance with the antitrust laws a true corporate priority.

b. Discipline of Culpable Actors (3572 (a)(8))

Two high-ranking employees who were personally involved, or supervised employees who were involved, in the conduct charged in this case were demoted and no longer have sales responsibilities. Other, lower-ranking, employees who were involved in the conduct may also be disciplined.

c. The Defendant's Financial Position (3572 (a)(1))

The Defendant is a solvent corporation and has agreed to pay the agreed-upon fine of $62 million within 15 days of the final judgment.

IV. MOTION FOR DOWNWARD DEPARTURE PURSUANT TO U.S.S.G. § 8C4.1

The United States requests that the Court impose a sentence that includes a criminal fine of $62 million, which is below the Guidelines fine range of $103.68 million to $207.36 million. While the recommended criminal fine reflects a 40% reduction from the minimum fine under the Sentencing Guidelines, the United States believes it is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2), and reflects the factors enumerated in 18 U.S.C. § 3572. The recommended fine is also appropriate because of the substantial assistance the Defendant provided to the United States in its continuing investigation of Sherman Act violations by other companies and individuals.

A. Legal Framework for Departures/Factors to be Considered

Under U.S.S.G. § 8C4.1, upon motion of the United States, when sentencing an organization, the Court may depart from the fine range determined pursuant to the Sentencing Guidelines based on the defendant's substantial assistance in investigating or prosecuting another

organization or individual. When determining the appropriateness and scope of any such departure, the Court may consider a variety of factors, including (but not limited to):

1. The significance and usefulness of the defendant's assistance;
2. The nature and extent of the defendant's assistance; and
3. The timeliness of the defendant's assistance.

U.S.S.G. § 8C4.1(b)

B. Summary of Substantial Assistance Provided

The United States' request for a downward departure is based on the three factors enumerated above.

First, the Defendant's assistance was extremely significant and useful in quickly moving the investigation forward. As a result of the cooperation provided by the Defendant, the United States was able to obtain important evidence of the conspiracy that was otherwise unavailable to the United States. The United States was able to obtain important documents evidencing the conspiracy that were located outside of the United States and, thus, beyond the reach of grand jury subpoena power. When producing these documents, as well as documents located within the United States, the Defendant provided English translations of important Japanese-language documents, thus making them immediately accessible to the United States and reducing the time and cost of the government's investigation. Additionally, as a result of the cooperation provided by the Defendant and its employees, both within the United States and from Japan, the United States was able to rapidly identify incriminating evidence on key documents and gain an in-depth understanding of the nature and scope of the conspiracy. Upon government request, the Defendant made company employees available for interviews at the Antitrust Division office in Chicago. These employees were based in Japan, beyond the reach of grand jury subpoenas.

When making employees available for interviews, the Defendant also provided Japanese-language interpreters as needed.

Second, the Defendant cooperated fully. It quickly conducted a comprehensive internal investigation designed to uncover the scope of the antitrust conspiracy. The Defendant provided information that assisted the United States in determining the extent to which the conspiracy impacted United States commerce, allowing the United States to more quickly focus its investigation.

In particular, pursuant to U.S.S.G. § 1B1.8, the Defendant provided information that expanded the scope of the conspiracy's impact on U.S. commerce. The United States was able to conduct interviews of the Defendant's employees more efficiently because of the Defendant's thorough and complete internal investigation. The Defendant is committed to continuing its cooperation by, among other things, continuing to provide documents and make its employees available to be interviewed in the United States. The Defendant is also committed to make its employees available to testify before the grand jury or at any trial that may result from the investigation. *See* Plea Agreement, ¶¶ 13-14, Docket No. 9.

Third, the Defendant's assistance was timely. Within a very short time after the service of a grand jury subpoena upon the Defendant, the Defendant agreed to cooperate and acknowledged that cooperation included pleading guilty to conduct that violated the Sherman Act, 15 U.S.C. § 1. Thereafter, the Defendant undertook an internal investigation, and subsequently made several attorney proffers to the United States regarding conduct relating to shock absorbers. Those attorney proffers enabled the United States to focus its investigation. The Defendant's early and wholehearted cooperation significantly advanced the United States'

investigation, particularly since evidence provided by the Defendant implicated another corporation and its employees in conduct that violates the Sherman Act.

C. United States' Evaluation of Substantial Assistance

The Sentencing Guidelines list as a relevant factor the United States' evaluation of the assistance rendered by the organization. U.S.S.G. § 8C4.1(b)(1). The United States believes that the Defendant has provided full, substantial, and timely cooperation that has been significant and provided useful assistance in the United States' ongoing investigation of violations of federal antitrust and related criminal laws in the shock absorbers industry. The Defendant's cooperation has provided the United States with extensive, credible information against both corporate and individual coconspirators, which has significantly advanced its investigation.

V. RECOMMENDED SENTENCE

The sentence recommended in this case takes into account the Defendant's substantial assistance as well as the factors enumerated in 18 U.S.C. §§ 3553 and 3572, and is a sentence sufficient, but not greater than necessary, to reflect the seriousness of the offense, to promote respect for the law, and to afford adequate deterrence. The United States and the Defendant jointly recommend the Court sentence the Defendant as follows. *See* Plea Agreement, ¶ 9, Docket No. 9.

A. $62 Million Criminal Fine

The United States and the Defendant have agreed that a criminal fine of $62 million is an appropriate sentence in this matter. In arriving at this figure, the United States took into account various factors enumerated in 18 U.S.C. §§ 3553(a) and 3572(a)(8), as discussed above, as well as the factors enumerated above in the government's motion for a downward departure for substantial assistance pursuant to U.S.S.G. § 8C4.1.

B. No Order of Restitution

Restitution is also a factor the Court must consider under 18 U.S.C. §§ 3553(a) and 3272 in determining and imposing sentence. Pursuant to 18 U.S.C. § 3663, restitution is not mandatory for violations of 15 U.S.C. § 1, and in light of the availability of civil causes of action that potentially provide for a recovery of a multiple of actual damages, *see* 15 U.S.C. § 15, the United States and the Defendant recommend that the sentence not include a restitution order.

C. No Term of Probation

Pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but not more than five years. In considering whether to impose a term of probation the Court should consider the factors set forth in 18 U.S.C. § 3553. *See* 18 U.S.C. § 3562. However, as noted above, because the Defendant is a corporation many of those factors do not apply. For the same reason, many of the conditions of probation set forth in 18 U.S.C. § 3563 are not applicable. The Court should also consider the factors in U.S.S.G. § 8D1.1 which set forth the circumstances under which a sentence to a term of probation is required. These circumstances include ordering a term of probation to secure payment of the special assessment, the fine, or restitution, or to ensure implementation of an effective compliance program.

In this case, the Defendant, a solvent corporation, has agreed to pay the special assessment and the agreed-upon fine of $62 million within 15 days of the final judgment. Furthermore, as noted above, the United States and the Defendant have agreed to recommend that restitution is not appropriate in this case because of the availability of civil causes of action that potentially provide for a recovery of a multiple of actual damages. *See* 15 U.S.C. § 15.

Finally, as described above, the Defendant has already implemented a new compliance program, taken action against culpable employees and managers, and has is no way indicated anything other than timely and complete acceptance of responsibility. Therefore, for these

reasons, the United States and the Defendant recommend that no term of probation be imposed by the Court in this case.

D. $400 Special Assessment

The Court should order the Defendant to pay a $400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B), and as agreed to by the United States and the Defendant.

VI. CONCLUSION

For these reasons, the United States recommends that the Court impose a sentence requiring the Defendant to pay a fine of $62 million, payable within 15 days of judgment, no order of restitution, no term of probation, and to pay a $400 special assessment.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 1:15-CR-00098
	)	
	)	
v.	)	
	)	Violation: 15 U.S.C. § 1
KAYABA INDUSTRY CO., LTD d/b/a KYB COPORATION,	)	
	)	Judge Michael R. Barrett
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on _____, 2015, I caused the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

1. Caitlin Felvus (cfelvus@taftlaw.com);
2. Larry A. Mackey (lmackey@btlaw.com);
3. Ralph William Kohnen (kohnen@taftlaw.com); and
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Respectfully submitted,

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AO 245E (Rev. 12/03) Judgment in a Criminal Case for Organizational Defendants
Sheet 1

UNITED STATES DISTRICT COURT

SOUTHERN District of OHIO (CINCINNATI)

UNITED STATES OF AMERICA
V.

Kayaba Industry Co., LTD

JUDGMENT IN A CRIMINAL CASE
(For Organizational Defendants)

CASE NUMBER: 1:15cr098
Caitlin Felvus, Larry Mackey, Ralph Kohnen, Brian Weir-Harden
Defendant Organization's Attorney

THE DEFENDANT ORGANIZATION:

☒ pleaded guilty to count(s) 1 of an Information

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The organizational defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
15 USC 1	Conspiracy to Restrain Trade	12/1/2012	1

The defendant organization is sentenced as provided in pages 2 through 3 of this judgment.

☐ The defendant organization has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant organization must notify the United States attorney for this district within 30 days of any change of name, principal business address, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant organization must notify the court and United States attorney of material changes in economic circumstances.

Defendant Organization's
Federal Employer I.D. No.: None

Defendant Organization's Principal Business Address:

KYB Corporation
World Trade Center Building
4-1 Hamamatsu-cho
2-chrome, Mirato-ku
Tokyo 105-611, Japan

Defendant Organization's Mailing Address:

same as above

10/29/2015
Date of Imposition of Judgment

Signature of Judge

Michael R. Barrett, United States District Judge
Name and Title of Judge

November 2, 2015
Date

AO 245E (Rev. 12/03) Judgment in a Criminal Case for Organizational Defendants
Sheet 3 — Criminal Monetary Penalties

DEFENDANT ORGANIZATION: Kayaba Industry Co., LTD
CASE NUMBER: 1:15cr098

CRIMINAL MONETARY PENALTIES

The defendant organization must pay the following total criminal monetary penalties under the schedule of payments on Sheet 4.

	Assessment	Fine	Restitution
TOTALS	$ 400.00	$ 62000000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant organization shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant organization makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ _____	$ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant organization shall pay interest on restitution or a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 4 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant organization does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245E (Rev. 12/03) Judgment in a Criminal Case for Organizational Defendants
Sheet 4 — Schedule of Payments

DEFENDANT ORGANIZATION: Kayaba Industry Co., LTD
CASE NUMBER: 1:15cr098

SCHEDULE OF PAYMENTS

Having assessed the organization's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 62000400.00 due immediately, balance due

☒ not later than 15 days of the judgment date, or

☐ in accordance with ☐ C or ☐ D below; or

B ☐ Payment to begin immediately (may be combined with ☐ C or ☐ D below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary penalties are made to the clerk of the court.

The defendant organization shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant organization shall pay the cost of prosecution.

☐ The defendant organization shall pay the following court cost(s):

☐ The defendant organization shall forfeit the defendant organization's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA; HSUAN BIN CHEN, aka H.B. CHEN; HUI HSIUNG, aka KUMA; LAI-JUH CHEN, aka L.J. CHEN; SHIU LUNG LEUNG, aka CHAO-LUNG LIANG and STEVEN LEUNG; BORLONG BAI, aka RICHARD BAI; TSANNRONG LEE, aka TSAN-JUNG LEE and HUBERT LEE; CHENG YUAN LIN, aka C.Y. LIN; WEN JUN CHENG, aka TONY CHENG; and DUK MO KOO, Defendants.	No. CR-09-0110 SI UNITED STATES' SENTENCING MEMORANDUM Date: September 20, 2012 Time: 10:00 a.m. Court: Hon. Susan Illston Place: Courtroom 10, 19th Floor

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I. INTRODUCTION

The government recommends that the Court sentence AU Optronics Corporation ("AUO") to pay a $1 billion fine and its top executives, H.B. Chen and Hui Hsiung, to serve ten years in prison and pay $1 million fines. These defendants and AUO's subsidiary, AU Optronics Corporation America ("AUOA"), were central figures in the most serious price-fixing cartel ever prosecuted by the United States. Only these sentences could possibly reflect the seriousness of this offense or provide adequate deterrence. The correctly and conservatively calculated Sentencing Guidelines ("Guidelines") ranges—a corporate fine of $936 million to $1.872 billion and prison terms from 121 to 151 months—suggest that these sentences are lenient ones for the offense in this case.

Defendants' offense was no regulatory violation, nor a momentary lapse soon regretted. Rather, fully conscious of the wrongfulness of their actions, AUO and its executives conspired with the other major makers of TFT-LCD panels to systematically fix prices. The conspiracy lasted five years, ending only when the FBI raided their offices and a federal grand jury subpoenaed the conspirators' records. And unlike their coconspirators, defendants have refused to cooperate, assist the investigation, or accept responsibility after the government discovered the cartel or even after the jury convicted them.

The conspiracy's breadth and its pernicious effect can hardly be overstated. The conspirators sold $71.9 billion in price-fixed panels worldwide. Even conservatively estimated, the conspirators sold $23.5 billion—AUO alone sold $2.34 billion—in price-fixed panels destined for the United States. The conspiracy particularly targeted the United States and its hi-tech companies: Apple, HP, and Dell. But the harm extended beyond these pillars of America's hi-tech economy. The conspiracy affected every family, school, business, charity, and government agency that paid more to purchase notebook computers, computer monitors, and LCD televisions during the conspiracy.

Yet, even the overcharges they paid do not fully reflect the conspiracy's harm. Because of the increased prices, notebook computers, computer monitors, and LCD televisions were not purchased by American consumers, causing further personal and social loss. Moreover, the

price-fixing conspiracy not only distorted the markets for TFT-LCD panels and products incorporating those panels, but indubitably affected related markets.

While the large criminal fines and lengthy prison terms recommended here are essential to deterring large-scale, highly profitable price-fixing conspiracies, more is needed to stamp out AUO and AUOA's corporate culture of criminal collusion. The Court should also require as a condition of AUO and AUOA's probation that they hire a compliance monitor to develop and implement an effective antitrust compliance program.

II. THE OFFENSE CONDUCT

A. Defendants Conspired to Fix the Price of TFT-LCD Panels

Over a five-year period starting in September 2001—the very month AUO was formed—defendants conspired to fix the price of TFT-LCD panels contained in almost every laptop computer and computer monitor sold in the United States. With much of the world demanding the product that they produced, defendants and their coconspirators were able to and did carry out a conspiracy that was as harmful as it was egregious.

A conspiracy so lengthy and pernicious could only succeed by being systematic. The conspirators—all the major manufacturers of standard-sized panels—held over 60 multilateral meetings, which they termed "crystal meetings." The pricing discussions and agreements at these meetings were detailed, and the participants left a voluminous written record of those meetings. *See, e.g.*, Government's Trial Exhibits ("Trial Exs.") 12T, 302T, 404T. In addition to the multilateral crystal meetings, defendants and their coconspirators engaged in even greater numbers of collusive one-on-one meetings and telephone communications in Asia and in the United States to police and carry out their price-fixing conspiracy. *See, e.g.*, Trial Exs. 86, 90, 95, 168, 476T, 480T, 501T, 505T, 515. The participants believed that the fruits of this conspiracy were well worth the risk as well as the extraordinary investment of time and effort that they poured into it.

At trial, defendants' coconspirators explained how the CEOs and Presidents of the participating companies attended the early crystal meetings to initiate and ensure the success of the conspiracy. These witnesses also testified that the supposedly competing panel

manufacturers reached price agreements at these meetings. Trial Tr. vol. 3 at 660 (J.Y. Ho); Trial Tr. vol. 6 at 1243 (Brian Lee); Trial Tr. vol. 13 at 2138 (Stanley Park); Trial Tr. vol. 17 at 2954 (C.C. Liu). Defendant H.B. Chen, AUO's President and Chief Operating Officer during the conspiracy, attended several of these high-level crystal meetings. Trial Exs. 1, 762; Trial Tr. vol. 4 at 830, 833; Trial Tr. vol. 22 at 4031. Defendant Hui Hsiung, AUO's Executive Vice President and President of AUO America during most of the conspiracy, also attended these early crystal meetings. Trial Exs. 1, 190, 768; Trial Tr. vol. 4 at 831; Trial Tr. vol. 22 at 4024-25. The participation and approval of Chen and Hsiung were necessary for the success of the conspiracy because they were the two highest-ranking executives at AUO, a company that at the end of the conspiracy had more than 40,000 employees.

After Chen and Hsiung attended the early crystal meetings and set out the purpose of the conspiracy, they passed on the day-to-day operation of the conspiracy to their subordinates by directing them to attend the meetings, take notes, and report on the matters discussed and agreed upon. Trial Exs. 15T, 20T. Scores of crystal meeting reports sent by their subordinates to Chen, Hsiung, and other AUO executives detail the pricing agreements reached at the crystal meetings. Trial Exs. 4, 306T, 308T-310T, 312T-318T, 405T, 407T, 409T-411T, 415T, 417T, 419T. Although the monthly crystal meetings were generally attended by the "working level" employees who did the day-to-day work of the conspiracy, the CEOs and Presidents of the participating companies, when necessary, would attend meetings to show their continued support for the purpose and goals of the cartel. Trial Exs. 52T, 431T.

AUO's participation in the conspiracy was not limited to its representation at the crystal meetings. Chen and Hsiung, along with other AUO employees, also discussed and coordinated pricing with competitors through one-on-one or bilateral meetings and telephone calls**.** For example, Chen and Hsiung attended a June 27, 2005 meeting with LG executives where they "agreed to increase [notebook panels] by $10 in July and August, respectively" and acknowledged the "active information exchange and collaboration" for notebook and monitor panels. Trial Ex. 515T. The conspirators stopped meeting as a group in crystal meetings in early 2006 in an effort to minimize the risk of detection. But AUO continued to meet with its co-

conspirators in serial one-on-one meetings in cafes and karaoke bars around Taipei through November 2006. In these meetings and through other bilateral contacts, the conspirators continued to share pricing information and align their prices as part of their ongoing agreement to fix the prices of standard-sized TFT-LCDs.

Defendant AUOA's employees implemented the conspiracy in the United States. These employees all reported either directly or indirectly to Hsiung, AUOA's President at the time, and ultimately to Chen. Trial Ex. 768. According to Michael Wong, AUOA's branch manager, AUOA was a "tentacle" or "extension of AUO" for the purpose of promoting and selling AUO's TFT-LCDs to major U.S. customers Dell, HP, and Apple. Trial Tr. vol. 4 at 834-35. The defendants strategically located AUOA's facilities and employees near these major customers: Houston, Texas for HP; Austin, Texas for Dell; and Cupertino, California for HP and Apple. Trial Tr. Vol. 4 at 838-39. United States-based AUOA account managers negotiated the price and volume of TFT-LCD sales to these major U.S. customers on a monthly basis. Trial Tr. vol. 5 at 858-66.

AUOA played a critical implementation role in the cartel by selling AUO's TFT-LCDs to U.S. customers at anticompetitive, illegally fixed prices. Reports of discussions and agreements by AUOA's President Hsiung and others at crystal meetings and through other one-on-one contacts in Taiwan were distributed to AUOA employees in the United States for use in their price negotiations with U.S. customers. *See, e.g.*, Trial Tr. vol. 5 at 854, 955-56; Trial Exs. 12T, 25T, 80, 86, 90, 91. In addition, Wong and AUOA's account managers for Dell, HP, and Apple participated in the conspiracy by coordinating prices with AUO's conspirators in the United States. For example, in 2003, Wong first began meeting in the United States with his competitor counterparts on the Dell account; likewise, others at AUOA had contacts with their respective counterparts on the Dell, HP, and Apple accounts. Trial Tr. vol. 5 at 880. During these discussions, the conspirators would discuss and align their pricing to Dell, HP, and Apple, encourage one another to increase prices, and affirm their intent to increase or maintain prices to these major U.S. customers. *See, e.g.*, Trial Tr. vol. 5 at 886-89; Trial Exs. 81, 83, 85, 89, 108.

The prices discussed with competitors were then implemented to AUO's U.S. customers. *See, e.g.*, Trial Exs. 88, 822.

B. Defendants Sought to Conceal Their Felonious Conduct

Chen and Hsiung knew that the conspiracy was illegal. The crystal meeting participants were well aware of and discussed the antitrust laws. Trial Ex. 474T. In fact, in 2002, it became public knowledge that the U.S. Department of Justice was investigating price fixing in the DRAM industry. Shortly thereafter, private lawsuits were filed. In the end, several DRAM corporations and executives pled guilty and were sentenced. The antitrust problems in the DRAM industry did not escape the attention of the TFT-LCD conspirators. Stanley Park testified at trial that he raised the DRAM antitrust investigation during the July 21, 2004 crystal meeting, which was called and hosted by Hsiung. Trial Tr. vol. 13 at 2241-42, 2246-48; Trial Ex. 431. Knowing the illegal nature of their alliance, the crystal meeting participants rotated their secret meetings among hotels in Taipei. They also only identified the meeting locations shortly beforehand in order to limit knowledge of the fact and location of the meetings. Trial Exs. 6T, 305T. The attendees also staggered their arrivals and departures to avoid being seen together. Trial Tr. vol. 7 at 1332-33; Trial Tr. vol. 13 at 2220-21; Trial Tr. vol. 17 at 3007-10.

Hsiung and others at AUO instructed subordinates to keep the meetings confidential and not disclose the pricing agreements reached at the crystal meetings. *See, e.g.*, Trial Ex. 118. The crystal meeting reports circulated within AUO were designated as "extremely confidential" and for limited distribution. *See, e.g.*, Trial Exs. 12T, 14T, 16T, 18T. Eventually the participants stopped taking these detailed notes because of the risk that the conspiracy could be leaked. At the July 2004 meeting that was hosted by Hsiung, the conspirators were warned to limit "written communication[s], which leave traces." Trial Ex. 431T. Later, as concerns grew that two primary victims of the conspiracy, Dell and HP, had discovered the clandestine meetings, the conspirators moved the meetings to teahouses, cafes, and karaoke bars, and sent even lower-level employees to the meetings to exchange the pricing information essential to the price-fixing conspiracy's continued success.

Only when the FBI raided AUOA's offices in Houston in December 2006 did AUO and AUOA cease their participation in the TFT-LCD cartel. At the time of the search, Wong and an AUOA HP account manager, Roger Hu, were attending a meeting at HP's offices in Houston. Trial Tr. vol. 5 at 1034. When they learned that the FBI was searching AUOA's office, Wong instructed Hu to begin deleting the contact information for conspiring companies from his cell phone and from the e-mails on his laptop. Trial Tr. vol. 5 at 1042. After Hu began deleting the e-mails, Wong realized the document destruction was futile because the FBI had probably seized his computer, and he and Hu returned to AUOA's offices to meet the FBI. *Id.* at 1043-44.

C. The Conspiracy Had a Massive Impact on U.S. Commerce

This conspiracy affected tens of billions of dollars of commerce in products used in almost every household, business, school, and government office in the United States. It victimized millions of American consumers. The United States was by far the world's largest consumer of products containing price-fixed TFT-LCD panels during the conspiracy. The panels manufactured by AUO and its coconspirators in Asia were shipped into the United States both as raw panels and in finished products that were assembled overseas but destined for sale in the United States. As Dr. Keith Leffler, the government's expert economist, testified, of the $71.8 billion in standard-sized TFT-LCDs produced and sold worldwide by the conspirators during the conspiracy period, approximately $23.5 billion worth, nearly 33 percent, made its way into the United States. Trial Tr. vol. 19 at 3309-17. Dr. Leffler's testimony, along with the jury's finding, that coconspirators gained at least $500 million from the conspiracy, is uncontroverted. Trial Tr. vol. 19 at 3282, 3380; Dkt. 851 (Verdict) 3; Trial Tr. vol. 24 at 4415 (AUO's expert, Mr. Deal, conceding he was not offering an opinion on overcharge by the entire conspiracy); Trial Tr. vol. 28 at 4896 (AUOA closing argument: "we're not here to talk about overcharge").

This massive impact on U.S commerce is unsurprising, given that U.S. computer companies like Dell and HP were among the conspirators' largest customers for panels during the conspiracy. Trial Tr. vol. 3 at 547, 643; Trial Tr. vol. 4 at 837; Trial Tr. vol. 15 at 2525. Furthermore, the United States was the largest market for the notebooks and computer monitors containing TFT-LCDs that Dell, HP, and Apple produced. Evidence presented at trial showed

that approximately 40 percent of HP's notebooks and 30 to 40 percent of HP's monitors were sold in the United States. Trial Tr. vol. 3 at 533. Approximately 60 to 70 percent of all Dell computer monitors and notebook computers were sold in the United States. Trial Tr. vol. 16 at 2885-86.

AUO and its coconspirators were aware that these companies were their biggest customers, and they explicitly targeted the United States and these companies at the crystal meetings, including meetings that Chen and Hsiung attended. Trial Exs. 302T, 303T, 305T, 306T, 309T, 311T, 427T, 438T. They also participated in one-on-one pricing discussions with their coconspirators regarding price quotes to U.S. customers. Trial Exs. 89, 515T; Trial Tr. vol. 14 at 2319, 2326.

As discussed below, AUO alone sold at least $2.34 billion of price-fixed TFT-LCDs that made their way into the United States during the conspiracy. As a result of these panel sales, AUO reaped massive ill-gotten gains from its participation in the conspiracy.

III. STANDARD OF PROOF AT SENTENCING

The government bears the burden of proving, by a preponderance of the evidence, the facts necessary to enhance a defendant's offense level under the Guidelines. *United States v. Burnett*, 16 F.3d 358, 361 (9th Cir. 1994).

IV. GUIDELINES CALCULATIONS

A. Defendants' Volume of Affected Commerce is $2.34 Billion

For antitrust offenses, the calculation of Guidelines ranges turns largely on the volume of commerce affected by the price-fixing conspiracy. *See* U.S.S.G. § 2R1.1(b)(2) (amended 2005) (offense level adjusted by volume of commerce); 2R1.1(c)(1) (fine range for individual is one to five percent of the defendant's volume of commerce); 2R1.1(d)(1) (base fine for corporations is 20 percent of the defendant's volume of commerce). Because the volume of affected commerce reflects the magnitude of the harm caused by the offense, it is a fitting benchmark for the Guidelines and exemplifies the nature and seriousness of the offense and the need for just punishment that is adequate to deter the criminal conduct.

In this case, the affected commerce is the same for all four convicted defendants: $2.34 billion, the sales by AUO of the 12.1- to 30- inch TFT-LCD panels specified in the Indictment ("indictment panels") that were both affected by the price-fixing conspiracy and incorporated into computer monitors and laptops sold in or for delivery to the United States. This commerce applies not only to AUO, but also to its executives, Chen and Hsiung, because for Guidelines purposes "the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation." U.S.S.G. § 2R1.1(b)(2). Similarly, AUO's sales of these panels can be attributed to AUOA because, as the Probation Office concluded, AUOA is AUO's subsidiary and because AUOA played a significant role in negotiating sales of price-fixed panels to major U.S. customers such as Dell, HP, and Apple during the conspiracy.

Determining the volume of affected commerce "does not require a sale-by-sale accounting, or an econometric analysis, or expert testimony." *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 91 (2d Cir. 1999); *see also United States v. Giordano*, 261 F.3d 1134, 1146 (11th Cir. 2001). Rather, courts have uniformly held that all sales made by the defendant during the conspiracy period should be presumed affected. *Giordano*, 261 F.3d at 1146 (presuming all sales within conspiracy period were affected unless the conspiracy was wholly a "non-starter" or "ineffectual"); *United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000) (holding that "the presumption must be that all sales during the period of the conspiracy have been affected by the illegal agreement, since few if any factors in the world of economics can be held in strict isolation"); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1273 (6th Cir. 1995) (concluding that "the volume of commerce attributable to a particular defendant . . . includes all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy.").

The term "affected" is "very broad and would include all commerce that was influenced, directly or indirectly, by the price-fixing conspiracy." *Hayter Oil*, 51 F.3d at 1273. Thus, a price-fixing conspiracy need not operate perfectly to affect sales. "Sales can be 'affected' . . . when the conspiracy merely acts upon or influences negotiations, sales prices, the volume of

goods sold, or other transactional terms." *SKW*, 195 F.3d at 91. And "[w]hile a price-fixing conspiracy is operating and has *any* influence on sales, it is reasonable to conclude that all sales made by defendants during that period are 'affected' by the conspiracy." *Id.* at 90. Therefore, the volume of affected commerce should include all sales made by defendants during the conspiracy period "without regard to whether individual sales were made at the target price." *Hayter Oil*, 51 F.3d at 1273.[1]

This presumption is supported by the purpose of the Sherman Act and the *per se* rule against price fixing. As the Sixth Circuit reasoned, "[i]t would be an anomaly to declare price fixing illegal per se without regard to its success, merely because of its plainly anticompetitive effect, but to provide for a fine only if the price fixing were successful." *Id*. at 1274. Such a rule would relieve the government of its burden to ascertain a conspiracy's success "for purposes of obtaining a conviction only to have to bear that very burden to establish the propriety of any fine." *Id.* Requiring this "burdensome inquiry" into the volume of commerce for sentencing purposes would be inconsistent with the *per se* rule itself. *Giordano*, 261 F.3d at 1146 (quoting *Hayter Oil*, 51 F.3d at 1273). "[T]he Sentencing Commission intended that the government have the benefit of a per se rule both at trial and at sentencing to avoid the protracted inquiry into the day-to-day success of the conspiracy." *Hayter Oil*, 51 F.3d at 1274; *see also* U.S.S.G. § 2R1.1 cmt. n. 3 and background.

1. The Estimate of $2.34 Billion in Affected Commerce Is Supported by the Analysis of an Expert Economist

Dr. Keith Leffler, the economist who testified as an expert witness for the government at trial, estimated $2.34 billion in affected commerce. This estimate is supported by Dr. Leffler's declaration submitted with the government's Sentencing Memorandum. Dr. Leffler estimated AUO's sales of indictment panels from October 2001 through December 1, 2006 that were

[1] Some courts suggest that this presumption is rebuttable in "the 'rare circumstance' of a completely unaffected transaction." *E.g.*, *Andreas*, 216 F.3d at 679 (quoting *SKW*, 195 F.3d at 93). In such cases, "the defendant should bear the burden of proving that rare circumstance." *Id.* The Court need not determine whether the presumption is rebuttable or not in this case because the conspiracy affected all of AUO's sales of indictment panels during the conspiracy. *See infra* Section IV.A.

incorporated into notebook computers or computer monitors and that were sold in or delivered to the United States.[2] He did so using invoice data from AUO, invoice and/or purchase data from five large U.S. personal computer manufacturers—Dell, HP, Apple, IBM, and Gateway ("U.S. PC OEMs")—and data from Gartner Dataquest, the same data source he relied upon during his trial testimony in estimating the volume of U.S. commerce affected by all six of the crystal meeting companies. Leffler Decl. ¶ 3.

To estimate AUO's sales of indictment panels to Dell that were used in notebook computers in the United States, Dr. Leffler first determined AUO's sales of notebook indictment panels, by quarter, made to Malaysia Direct Ship ("MDS"), the entity within Dell responsible for purchasing TFT-LCD panels for notebooks destined for North America and South America. Leffler Decl. ¶ 6. Since 100 percent of the notebooks shipped from MDS came to the Americas, Dr. Leffler then estimated the percentage of those panels that went to the United States by using Gartner data showing Dell's personal computer sales by country within the Americas. Leffler Decl. ¶ 7. By multiplying that percentage, calculated for each quarter during the conspiracy, by AUO's sales to MDS, Dr. Leffler estimated AUO's sales of indictment panels to Dell during the conspiracy that were incorporated into notebook computers used in the United States. Leffler Decl. ¶ 7 and tbl.2A.

For Dell monitor panels, Dr. Leffler determined AUO's sales of monitor indictment panels, by quarter, made to Dell Global Procurement Malaysia ("DGPM"), which purchased all of Dell's monitor panels worldwide. DGPM then resold those panels to system integrators, which then sold finished computer monitors back to Dell through various regional purchasers. Leffler Decl. ¶ 8. To estimate the percentage of AUO's sales of monitor panels to Dell that ended up in the United States, Dr. Leffler used data from Dell and Gartner that showed the percentage of all Dell monitors that were destined for the United States. Leffler Decl. ¶¶ 9-10.

[2] Dr. Leffler also considered the raw panels that were sold by AUO and imported to the United States. Because it is possible that those panels are included in his finished product calculations, he did not include those sales in his estimate of AUO's volume of commerce. Leffler Decl. ¶ 4 n. 5.

For each quarter of the conspiracy, he then multiplied that percentage by AUO's sales to DGPM to estimate AUO's sales of indictment panels to Dell during the conspiracy that were sent to the United States. Leffler Decl. ¶¶ 9-10 and tbl. 2A.

Dr. Leffler made similar estimates for AUO's sales of indictment panels to both HP and Apple on a quarterly basis. Leffler Decl. ¶¶ 12-21. He also determined that AUO did not make any sales of indictment panels during the conspiracy to IBM or Gateway. Leffler Decl. ¶ 22.

From these calculations, Dr. Leffler estimated that these U.S. PC OEMs purchased a total of $1.51 billion of indictment panels from AUO from October 2001 through November 2006. Leffler Decl. ¶ 23 and tbl.1. The five U.S. PC OEMs, however, accounted for only 62 percent of PC sales in the United States during this time period. As a result, this $1.51 billion figure excludes the remaining 38 percent of the notebook computers and computer monitors, almost all of which contained a TFT-LCD panel. To account for that remaining 38 percent of indictment panels sold into the United States by computer manufacturers such as Acer, Toshiba, and Lenovo, Dr. Leffler used quarterly Gartner data to estimate AUO's sales to these other PC sellers by assuming that AUO sold indictment panels to these other sellers in the same proportion as it did to Dell, HP, Apple, IBM, and Gateway. Leffler Decl. ¶ 24. It is unlikely that AUO sold proportionally less to the remaining 38 percent of the market. Rather, in all likelihood, AUO actually sold proportionally *more* to those other customers. That is a reasonable and conservative assumption because (1) there were lengthy periods of time during the conspiracy when AUO did not sell *any* indictment panels to these five U.S. PC OEMs; (2) neither IBM nor Gateway purchased any indictment panels from AUO during the entire conspiracy; (3) Dell did not directly purchase any notebook panels from AUO before the second quarter of 2004 and did not directly purchase any monitor panels from AUO before the third quarter of 2005; (4) HP did not start directly purchasing AUO notebook panels until the third quarter of 2002; and (5) the data relating to HP's purchase of monitor panels does not reflect purchases from any supplier prior to July 2003, which strongly suggests that Dr. Leffler undercounted HP's purchases of such panels from AUO during the conspiracy. Leffler Decl. ¶ 24.

After accounting for the rest of the U.S. PC market, Dr. Leffler estimated that AUO's sales of indictment panels from October 2001 through December 1, 2006 that were incorporated into personal computers sold in the United States totaled $2.34 billion:

AUO's TOTAL VOLUME OF AFFECTED U.S. COMMERCE
(PCs ONLY; TV PANEL SALES EXCLUDED)

OEM	AUO SALES TO U.S.
Dell	$721,148,464
HP	$701,725,776
Apple	$85,660,835
IBM	$0
Gateway	$0
Remaining 38% of U.S. PC sellers	$831,973,582
TOTAL	**$2,340,508,657**

Leffler Decl. ¶25 and tbl.1. Again, this $2.34 billion estimate is conservative because it excludes AUO's sales of indictment TV panels, which account for about seven percent of AUO's worldwide sales of indictment panels during the conspiracy. Leffler Decl. ¶ 25.

Dr. Leffler's methodology is largely consistent with the government's approach in estimating the volume of commerce for companies that pled guilty and were sentenced by this Court earlier in the investigation. As with the methodology Dr. Leffler used in estimating AUO's volume of commerce, the government estimated the pleading defendants' volume of affected commerce by totaling those companies' sales to the five U.S. PC OEMs (Dell, HP, Apple, Gateway, and IBM) that made their way back to the United States in finished computer monitors and notebooks ("plea methodology"). The plea methodology also included all TFT-LCD panels that were invoiced in the United States regardless of whether they were integrated into finished products ultimately shipped to the United States.[3] Dr. Leffler's methodology is

[3] Raw panels that were imported directly into the United States were also counted under the plea methodology. Dr. Leffler did not include any additional volume of commerce from these directly imported panels because his volume of commerce estimate may have included those panels in his finished product calculations. Leffler Decl. ¶ 4 n. 5.

more conservative —he does not count all panels invoiced in the United States, only the ones that were actually shipped to the United States in finished products.

Dr. Leffler's methodology augments the plea methodology in two primary respects: (1) it includes AUO's sales of monitor panels to HP, and (2) it counts the remaining 38 percent of the U.S. market for finished computer monitors and notebooks that were sold to U.S. consumers by non-U.S. PC OEMs, such as Acer, Toshiba, and Lenovo.

The plea methodology did not include the pleading companies' sales of monitor panels to HP because the government did not have data for those sales at the time it negotiated those plea agreements. This accounts for a significant share of the panels sold to HP. Because HP only started tracking these prices in 2003, and thus no sales from 2001 through mid-2003 are included, the HP sales figures relied upon by Dr. Leffler substantially understate AUO's actual sales to HP during the conspiracy.

The plea methodology also omitted PC OEM sales to the remaining 38 percent of the U.S. market. At the time the government entered into plea agreements with crystal meeting companies—LG (2008), CPT (2008), CMO (2010), and HannStar (2010)—it had insufficient data from the TFT-LCD suppliers, OEMs, and relevant industry publications to allow it to identify all of each pleading company's volume of affected commerce. In continuing its investigation and preparing for trial, the government acquired additional data and other information that allowed it to do a more complete and accurate estimate of affected commerce.

It is not unusual for a defendant that proceeds to trial to face a more accurate, but higher, volume of commerce as the government develops more information. That does not reflect an inconsistent methodology. And in this case, the government's methodology is not only consistent, but accurately reflects the magnitude of the harm caused by the offense as prescribed by the Guidelines.

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2. $2.34 Billion in Affected Commerce Is a Conservative Estimate

Dr. Leffler's approach in estimating affected commerce is conservative.[4] The $2.34 billion estimate excludes sales of TFT-LCD panels that were incorporated into computer monitors and laptops that were sold outside of the United States—even if those products were sold by U.S. companies like Dell, HP, and Apple. Nothing in the Guidelines or the case law suggests that the volume of affected commerce needs to be limited in this way. Rather, the Guidelines direct the Court to consider all commerce affected by the violation. Here, the violation is a global price-fixing conspiracy, and it affected sales of panels both in the United States and around the world.[5] Nonetheless, the government takes the conservative approach by excluding sales of TFT-LCD panels that were not destined for the United States. This approach is aligned with the Court's instruction on the offense's elements and its gain, which limited consideration to TFT-LCD panels either sold in or for delivery to the United States or incorporated into finished products sold in or for delivery to the United States (Dkt. 817 at 10, 15; Trial Tr. vol. 27 at 4721, 4728-29.

The $2.34 billion commerce estimate further excludes categories of sales for which the government did not have adequate data to make a reliable estimate. For example, it excludes all of AUO's sales of television panels, which accounted for seven percent of its worldwide sales of indictment panels during the conspiracy. *See* Leffler Decl. ¶¶ 3, 25. If anything, the $2.34 billion estimate understates the commerce actually affected by the conspiracy.

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[4] The volume of commerce estimate for purposes of sentencing differs from the gain found by the jury for purposes of 18 U.S.C. § 3571(d). The jury's finding included gain to AUO and its coconspirators, while the government's estimate of the affected commerce excludes sales of price-fixed TFT-LCD panels by AUO's coconspirators.

[5] Even if the government could charge a conspiracy only to the extent that it impacted certain types of commerce, the Guidelines expressly state that sentences should be based on related, but uncharged conduct. *See* U.S.S.G. § 1B1.3; *see also United States v. Dawn*, 129 F.3d 878, 879 (7th Cir. 1997) (affirming sentence for possession of child pornography using the more severe Guidelines provision applicable to the production of child pornography, even though the production offense was not charged because the production took place abroad and the statute did not apply extraterritorially).

3. Defendants' Estimate Vastly Understates Affected Commerce

Defendants estimate that AUO's volume of affected commerce is only between $151.1 million and $223.7 million—just six to nine percent of the government's estimate.[6] This wide discrepancy is the result of defendants' expert, Dr. Robert Hall, improperly excluding several categories of AUO's sales, including (1) all of AUO's sales for the final ten months of the conspiracy, from February through December 1, 2006; (2) all of AUO's sales of panels to anyone other than 13 selected U.S. companies, regardless of whether those panels were incorporated into finished products that ended up in the United States; (3) all of AUO's sales of monitor panels that were incorporated into HP's desktop computer monitors; (4) all of AUO's sales during months when it attended crystal meetings and received specific prices from its conspirators, but did not provide price information to others; and (5) all of AUO's sales to coconspirators LG and Samsung. Each of these errors is discussed below.

a) Defendants Improperly Exclude All of AUO's Sales During the Last Ten Months of the Conspiracy

Dr. Hall excludes the last ten months of the conspiracy—a total of 41 percent of AUO's affected volume of commerce—based on a fundamental misunderstanding of Dr. Leffler's trial testimony and the purpose of that testimony. Leffler Decl. ¶ 29. Dr. Leffler was tasked with determining whether the participants in the crystal meeting conspiracy derived gross gains of at least $500 million (the overcharge set forth in the Indictment's sentencing allegation) for purposes of satisfying 18 U.S.C. § 3571(d). He did so by studying the effect of the group crystal meetings on the revenues of the participating companies. Leffler Decl. ¶¶ 29-30 nn.19, 20. These group crystal meetings occurred during a 52-month period from October 2001 through January 2006. *Id*. Dr. Leffler never testified that the conspiracy ended in January 2006. Indeed,

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[6] The parties exchanged expert declarations more than one month ago. Through this process, the parties' experts provided their respective views on the affected volume of commerce. After the parties exchanged declarations in early August, the experts reviewed the opinions each side provided and responded to those opinions in the expert declarations attached to the parties' respective Sentencing Memoranda. References in Dr. Leffler's declaration to paragraphs in Dr. Hall's declaration refer to Dr. Hall's draft declaration of August 10, 2012, attached as Exhibit C to the Leffler Declaration.

defendants made sure that the jury was instructed that Dr. Leffler was not testifying as a conspiracy witness. Dkt. 817 at 5 (Final Jury Instructions) ("[N]o expert witness can offer an opinion on the ultimate issue of whether the charged conspiracy existed."). He could, however, testify about the "effect of the alleged conspiracy on U.S. commerce," (*id.*) which he did by focusing on the price discussions recorded in 52 months of detailed crystal meeting notes to determine that the conspiracy resulted in overcharges in excess of $500 million.

As Dr. Leffler notes in his declaration, his relevant inquiry at trial was to determine whether the gain from the conspiracy on U.S. commerce was greater than $500 million. To do this, he focused on the 52 months of group crystal meetings. The conspirators' gain during that period was the easiest to quantify because the crystal meeting participants kept such thorough records memorializing their pricing discussions on a monthly basis. The conspirators stopped keeping such detailed records in early 2006 because they feared detection. Based only on this narrower time frame, Dr. Leffler readily concluded the gain was more than the $500 million the government alleged in its Indictment and needed to prove at trial. But the price-fixing conspiracy continued through November 2006 as the coconspirators continued to meet one-on-one in furtherance of the conspiracy. Dr. Leffler simply had no need—for purposes of concluding the gain exceeded $500 million—to examine that period.

The task of calculating overcharges for purposes of 18 U.S.C. § 3571(d) is fundamentally different from the task of determining the "volume of affected commerce" under U.S.S.G. Section 2R1.1. For sentencing purposes, under Section 2R1.1, "[w]hile a price-fixing conspiracy is operating and has *any* influence on sales, it is reasonable to conclude that all sales made by defendants during that period are 'affected' by the conspiracy." *SKW*, 195 F.3d at 90. In responding to this very different task of determining whether the prices charged by AUO were affected in any way during the entire conspiracy period, Dr. Leffler concluded that "[t]he evidence is clear that the conspiracy impacted prices from October 2001 through December 1, 2006." Leffler Decl. ¶ 30.

In reaching this conclusion, Dr. Leffler considered the evidence that the conspirators continued to meet one-on-one in cafes around Taiwan after they stopped meeting as a group by

February 2006. Leffler Decl. ¶ 30. He considered trial testimony where conspiracy witness Milton Kuan testified that the participants continued to share the same information that they provided in the group crystal meetings when they met one-on-one. *Id*. The evidence showed that the conspiracy only—and abruptly—ended in December 2006 when the Department of Justice issued grand jury subpoenas and the FBI executed a search warrant on AUO America's offices. Trial Tr. vol. 21 at 3797.

Dr. Leffler also considered the evidence of AUO's continued bilateral contacts with competitors throughout 2006. Leffler Decl. ¶31, Ex. D. As discussed in Section II.A. above, AUO's participation in the conspiracy was not limited to its representation at the crystal meetings and continued one-on-one meetings in cafes around Taiwan. AUO also participated in pervasive bilateral contacts with competitors where the companies coordinated and aligned their pricing to specific accounts. This pervasive bilateral conduct continued throughout 2006. For example, in an April 26, 2006 e-mail, Steven Leung, Director of U.S. accounts in AUO's Monitors Business Unit, directed his sales team to "align with other TFT vendors to ensure we are not quoting too low or much too high." Trial Ex. 108. When finalizing bottom-line prices and quotations to customers, AUO employees also sent out the following directives:

- "[P]rovide any input you may have for competitor market quotations…. I only need competitor pricing info." April 20, 2006, Trial Ex. 106;
- "Let's get other competitor's status for reference before we try to feed back our proposal to HP." April 26, 2006, Trial Ex. 105;
- Regarding AUO's quote to HP: "If CMO Taiwan's people try to double check with you, this is what I told them in Houston. We need to line up our information!" April 26, 2006, Trial Ex. 109;
- Yesterday I visited AMLCD [Samsung] to know the AMLCD NB policy…[AMLCD] hopes AUO also follow AMLCD's strategy." June 29, 2006, Trial Ex. 188;
- To the U.S. account representative for Apple regarding AUO's quote to Apple: "Our suggestion is to follow LPL --> 'Standard+$50.'" August 11, 2006, AU-MDL-06430178;

- CMO just phoned me for HP's Oct price discussion…AUO's status that I told CMO…." October 25, 2006, Trial Ex. 113.

In the context of an ongoing five-year price-fixing conspiracy, this evidence demonstrates the agreement to fix prices continued. Even as late as November 23, 2006, in an e-mail forwarded by Steven Leung, AUO employees noted the importance of "market info. sharing" on AUO December "pricing ideas" and noted that "some of major suppliers would like to keep flat for the first quotation, but prepare for $2-3 down for 17" and 19"." Trial Ex. 189. This same proposal was then suggested as AUO's pricing plan. *Id.* And in August 2006, AUO employees were just as concerned, if not more, about the legality of their collusive behavior: "NYer is suspecting suppliers are exchanging price information. This is illegal, especially in the [S]tates. We need to be watchful!" Trial Ex. 172. And, as noted above, when the FBI searched AUO America's offices in December 2006, the branch manager of AUO America instructed his subordinate to delete conspirator contact information from his cell phone and computer. Trial Tr. vol. 5 at 1042.

All this evidence demonstrates that the conspiracy lasted at least until the FBI executed search warrants in the United States and the DOJ issued subpoenas on the coconspirator companies in December 2006. The defendants participated in that conspiracy up until the last moment; up until their employees' last-ditch efforts to keep it secret. And AUO's prices were affected as a result. Moreover, the defendants have no response to this evidence of the conspirators' continued collusive behavior, the continued efforts to target U.S. customers by aligning prices and keeping them higher than they should have been through the price-fixing agreement, and their continued efforts to hide the existence of the conspiracy. Instead, the defendants claim that the Court should ignore ten months of the conspiracy because Dr. Leffler did not testify at trial to the conspiracy's existence or effect during that time. But Dr. Leffler was not asked that question and he did not answer it at trial, nor did he have to. But he does now: "The evidence is clear that the conspiracy impacted prices from October 2001 through December 1, 2006." Leffler Decl. ¶30. Accordingly, Dr. Hall has no basis to exclude AUO's sales during the last ten months of the conspiracy.

b) Defendants Improperly Exclude All of AUO's Sales to Major Sellers of PCs into the United States

Dr. Hall fails to count any AUO sales to non-U.S. companies, omitting sales to major household-name computer manufacturers, such as Toshiba, Lenovo, Acer, and eMachines, that undoubtedly sold large quantities of notebook computers and computer monitors in the United States that included AUO's price-fixed panels.[7] That failure cannot be reconciled with the Guidelines, which require counting all AUO sales affected by the "violation." U.S.S.G. § 2R1.1(b)(2). Nothing in the Guidelines or the case law suggests affected commerce is limited to sales to U.S. companies, especially when, as here, the foreign companies sold notebook computers and computer monitors in the United States that included AUO's price-fixed panels.

Moreover, Dr. Hall's methodology is inconsistent with the Court's approach to identifying the commerce relevant to the elements of the offense and the gross gain to the conspirators under 18 U.S.C. § 3571(d). For both, the Court ruled that the relevant commerce included TFT-LCD panels incorporated into finished products sold in or for delivery to the United States. Trial Tr. vol. 27 at 4721, 4728-29. The Court never suggested that only sales made to U.S. computer companies could be counted in assessing relevant commerce. Instead, the focus was on the effect on commerce in the United States. The Court's rulings in this case were consistent with its rulings in the related private civil damage actions. In *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011), this Court rejected the civil defendants' argument to "exclude from the Sherman Act's reach a significant amount of anticompetitive conduct that has real consequences for American consumers" under the FTAIA. As the TFT-LCD panel cartel illustrates, "modern manufacturing takes place on a global scale." *Id*. In the FTAIA context, this Court was properly "skeptical that Congress intended to remove

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[7] Dr. Hall excludes all AUO sales to companies other than 13 U.S. companies he selected. Hall Decl. ¶ 19 & App. C. As Dr. Leffler explains, although Dr. Hall includes eight purchasers in addition to the five U.S. PC OEMs (Dell, HP, Apple, Gateway, and IBM) in his calculations, these additional eight companies add very little. Leffler Decl. ¶34 n. 29. Indeed, the combined sales of Dell, HP, and Apple constitute 95% of the sales of the thirteen purchasers considered by Dr. Hall. *Id.* Accordingly, these additional companies included in Dr. Hall's analysis only negligibly increase his volume of commerce number.

from the Sherman Act's reach anticompetitive conduct that has such a quantifiable effect on the U.S. economy." *Id*. at 964. The Court should be similarly skeptical here of removing commerce with effects on the U.S. economy from the volume of affected commerce under the Sentencing Guidelines. Indeed, the affected commerce considered for purposes of the Guidelines is broader than commerce considered for purposes of the FTAIA. *See supra* Sec. IV.A.1. & n. 3.

c) Defendants Improperly Exclude All of AUO's Sales of Monitor Panels Incorporated into HP's Desktop Monitors

Dr. Hall also excludes all AUO sales of monitor panels used in HP's desktop computers that were sold in the United States. Leffler Decl. ¶ 33. This is a significant exclusion because HP is the second-leading seller of personal computers in the United States and was AUO's second-largest customer for monitor panels during the conspiracy. Leffler Decl. ¶ 33 and n. 28. Dr. Hall excludes these sales not because he disputes that a significant percentage of AUO's panels were used in computer monitors in the United States, but because HP was not invoiced directly for those sales. AUO first sold the monitor panels to a non-U.S. system integrator—at prices that AUO negotiated with HP in the United States—and then that system integrator invoiced HP for the negotiated price of the monitor panel when it sold the assembled product to HP. Leffler Decl. ¶ 33.

For the reasons explained in Section IV.A.1 above, Dr. Hall's exclusion of all of these monitor panel sales, based solely on the fact that AUO first sold these panels to a non-U.S. system integrator, cannot be reconciled with the Guidelines, the facts of this case, or even the limitations the Court included in its jury instructions for gain and the offense elements. Dr. Leffler followed the correct approach by including these sales in his estimate of AUO's volume of affected commerce. Leffler Decl. ¶ 33.

d) Defendants Improperly Exclude All of AUO's Sales During Months When It Attended Crystal Meetings and Collected, But Did Not Contribute, Specific Price Information

Dr. Hall next excludes a significant percentage of AUO sales—accounting for approximately 75 percent of the AUO sales included in Dr. Leffler's estimate—in order to limit sales to those "subject to cartel influence, in the sense that their prices were discussed at the

Crystal Meetings." Hall Decl. ¶ 29. Yet he does much more than just eliminate AUO's sales in those months in which prices were not discussed. Instead, he eliminates AUO's sales in every month except those in which either: (1) AUO itself specified a price at a crystal meeting; or (2) there was a general "industry" price listed in the crystal meeting notes. Leffler Decl. ¶¶ 33-37. So if, during a given crystal meeting, three of AUO's competitors provided their target prices for a 15-inch notebook panel, but AUO did not, Dr. Hall excludes AUO's sales of that panel for the following month. In essence, Dr. Hall assumes that AUO's panel prices were affected only when it was *giving* price information to its competitors and not when it was *getting* such information from them and commits the same error that has been uniformly rejected by the courts of appeals. *See Hayter Oil*, *SKW*, and *Giordano*; *see also supra* Sec. IV.A.

As Dr. Leffler notes, this makes no economic sense. Leffler Decl. ¶ 37. Economic theory (and common sense) teaches that the greatest impact on AUO's prices is expected when it learns about its conspirators' pricing plans in the context of an ongoing conspiracy to fix prices. *Id.* There were numerous months in which AUO attended crystal meetings and listened to its conspirators' pricing information, but did not provide its own. *Id.* For example, at the November 2005 meeting, CMO, CPT, HannStar, and Samsung provided target prices for the SXGA 17-inch monitor. AUO did not. Trial Exs. 73T, 445. Yet in that month, AUO had the second-highest average price for this monitor of any of the crystal meeting participants. Leffler Decl. ¶ 36. It makes no economic sense—let alone common sense—to conclude that AUO's prices were not affected by attending this meeting and hearing its conspirators' pricing plans. *Id.* Sales during these months should be included in AUO's volume of affected commerce.

Dr. Leffler's declaration explains a number of other problems with Dr. Hall's exclusion of these sales. *See* Leffler Decl. ¶¶ 37-39. For example, by following this approach, Dr. Hall includes AUO's sales of the 13.3-inch XGA notebook panel in January and March 2002, but not for the month in between—February 2002. Yet he does not present any data showing a significant change of the prices of this panel in February 2002 that would justify a conclusion that AUO's price in that month was not affected. Leffler Decl. ¶ 39.

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e) Defendants Improperly Exclude All of AUO's Sales to LG and Samsung

The final major defect in Dr. Hall's commerce estimate is that he excludes all of AUO's sales to coconspirators LG and Samsung, which had affiliated display companies that purchased TFT-LCD panels for the manufacture of finished products incorporating those panels. Hall Decl. ¶ 30. Because of Dr. Hall's assumption that these companies are able to supply their own panels internally if AUO attempted to sell panels to them at inflated prices, Dr. Hall erroneously concludes that all such AUO sales during the conspiracy "*must* have occurred at prices without any overcharge." Hall Decl. ¶ 31 (emphasis added).

Dr. Hall's theoretical assumption overlooks the evidence at trial showing that the conspirators took steps to limit any discounts on internal sales. In fact, this issue was addressed at the very first crystal meeting, on September 14, 2001, in which the conspirators agreed that the "internal sales price shall not be discounted more than 3 percent . . . in order to avoid disturbing the order of market prices." Trial Ex. 302. Similarly, at the November 15, 2001 meeting, it was agreed to try to limit price competition in certain cases, including those involving "strategic clients" and "internal relationship[s]." Trial Ex. 306.

These efforts apparently worked, because both Dr. Hall and Dr. Leffler agree that LG and Samsung purchased panels at essentially the same prices as did other customers. Hall Decl. ¶ 44; Leffler Decl. ¶ 43. Given that AUO's prices to LG and Samsung were approximately the same as its prices to other customers, AUO either overcharged everyone or, as Dr. Hall contends, did not overcharge anyone. Leffler Decl. ¶ 43. Dr. Hall's exclusion of AUO's sales to LG and Samsung therefore rests entirely on his untenable contention that there is no "measurable overcharge attributable to AUO." Hall Decl. ¶ 9.

But the jury heard this same argument from AUO's expert at trial, Mr. Deal. He testified repeatedly that AUO did not overcharge anyone, and that the lack of any overcharge was inconsistent with AUO participating in a price-fixing conspiracy.[8] Yet the jury convicted AUO

[8] *E.g.*, Trial Tr. vol. 24 at 4375 ("there's no evidence of AUO overcharging. . . . That's not consistent with AUO participating in a price-fixing agreement.").

of participating in such a conspiracy, and found beyond a reasonable doubt that AUO and its coconspirators overcharged their customers by at least $500 million. Dkt. 851. Similarly, Dr. Leffler's regression analysis found a statistically significant overcharge, by AUO alone, of over 19 percent. Leffler Decl. ¶ 45.

The evidence is consistent with AUO overcharging all of its customers, including LG and Samsung, by a substantial amount. Dr. Hall's exclusion of all of AUO's sales to LG and Samsung is not justified.

B. The Guidelines Ranges for Each Defendant

1. AUO's Guidelines Fine Range Is $936,000,000 to $1,872,000,000

For corporations, the Guidelines first determine a base fine and then calculate a fine range by applying minimum and maximum multipliers to that base fine. U.S.S.G. §§ 8C2.1-8C2.7. Those multipliers are based on a culpability score. *Id.*

Under Section 8C2.4(a)(1)-(3), a corporation's base fine is the greatest of (1) the amount from the table in Section 8C2.4(d), (2) the corporation's pecuniary gain from the offense, or (3) the pecuniary loss from the offense caused by the corporation. In this case, the greatest base fine is the pecuniary loss. For antitrust offenses, the Guidelines instruct sentencing courts, "[i]n lieu of the pecuniary loss under subsection (a)(3) of § 8C2.4," to "use 20 percent of the volume of affected commerce." U.S.S.G. § 2R1.1(d)(1); *see* U.S.S.G. § 8C2.4(b).

The 20 percent of affected commerce serves as a surrogate for loss. The Guidelines' 20 percent figure derives from the estimate "that the average gain from price-fixing is 10 percent of the selling price" and from the reasoning that the "loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices." U.S.S.G. § 2R1.1 cmt. n.3. Thus, "[b]ecause the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of volume of affected commerce is to be used." *Id.* In addition, the purpose of specifying a particular percentage—20 percent—is "to avoid the time and expense that would be required for the court to determine the actual gain or loss." *Id.*

Thus, AUO's base fine is 20 percent of the $2.34 billion in affected commerce: $468 million. AUO's culpability score under U.S.S.G. Section 8C2.5 is ten. AUO starts out with five points under Section 8C2.5(a) and receives an additional five points because it had more than 5,000 employees[9] and "individuals within high-level personnel" of AUO participated in the offense conduct. No factors support a reduction. Based on its culpability score, the base fine multipliers are 2.0 and 4.0. Therefore, AUO's Guidelines fine range is $936,000,000 to $1,872,000,000:

- Base Fine (20% of $2.34 billion) (§ 2R1.1(d)(1) & 8C2.4(b)) — $468 million
- Culpability Score

i.	Base (§ 8C2.5(a))	5
ii.	Involvement in or Tolerance of Criminal Activity (§ 8C2.5(b)(1))	5
iii.	Prior History (§ 8C2.5(c))	0
iv.	Violation of Order (§ 8C2.5(d))	
v.	Obstruction of Justice (§ 8C2.5(e))	0
vi.	Effective Program to Prevent and Detect Violations of Law (§ 8C2.5(f))	0
vii.	Self-Reporting, Cooperation, and Acceptance of Responsibility (§ 8C2.5(g))	0
	Total Culpability Score:	10

- Minimum and Maximum Multipliers (§ 8C2.6) — 2 – 4
- Minimum and Maximum Fine Range — $936 million to $1.872 billion

Because the jury found $500 million in gain from the offense, the statutory maximum fine is $1 billion. *See* 18 U.S.C. § 3571(d). Thus, the Court can impose a sentence anywhere

[9] While AUO objects to the PSR's finding that it employed over 40,000 persons throughout the conspiracy because it employed fewer than 40,000 before 2006, AUO does not apparently contest the Probation Office's finding that AUO employed at least 5,000 employees and that high-level personnel—its President and COO, H.B. Chen, and its Executive Vice President of Sales, Hui Hsiung—were involved in and tolerated the criminal conduct.

within the Guidelines range "provided that the sentence is not greater than" $1 billion. U.S.S.G. § 5G1.1(c)(1).[10]

a) AUO's Guidelines Fine Range Must Be Based on 20 Percent of Affected Commerce

AUO has suggested that the Section 2R1.1's 20 percent figure cannot be used to calculate the base fine for AUO or AUOA. AUO Objections to Presentence Report ("PSR Objections") at 4. But "it would be procedural error for a district court to fail to calculate—or to calculate incorrectly—the Guidelines range." *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc); *see United States v. Rodriguez-Ocampo*, 664 F.3d 1275, 1278-79 (9th Cir. 2011) (vacating sentence for incorrectly calculating Guidelines range). The failure to use the 20 percent figure or the substitution of another factor to determine the base fine and, in turn, the Guidelines fine range, would be just such an error. Because "the Guidelines are the starting point and the initial benchmark" for all sentencing proceedings, such proceedings "are to begin by determining the applicable Guidelines range." *Carty*, 520 F.3d at 991 (internal quotation marks and citations omitted). The Guidelines "range must be calculated correctly." *Id.*

In correctly calculating the range, the 20 percent figure is not optional. Rather, the Guidelines direct the sentencing court to "use 20 percent of the volume of affected commerce" to determine a corporation's base fine for antitrust offenses. U.S.S.G. § 2R1.1(d)(1). Defendants' claim that the overcharge was no more than 1.8 percent is not only erroneous, but also irrelevant in calculating the Guidelines range. PSR Objections at 4. The Guidelines use a specific percentage—20 percent—"to avoid the time and expense that would be required for the court to determine the actual gain or loss." U.S.S.G. § 2R1.1 cmt. n.3. Even if the Court could quickly and easily determine the actual gain or loss, the Guidelines do not permit substituting the actual overcharge for the Guidelines' 10 percent overcharge estimate for price fixing, which is doubled

[10] Earlier in this case, for purposes of 18 U.S.C. § 3571(d), AUO and AUOA argued that "the government is required by *Apprendi* to prove the purported gain or loss arising from any offense to the jury and beyond a reasonable doubt." Opposition of Defendants AUO and AUOA to Government's Motion for Bifurcation and Order Regarding Fact Finding for Sentencing. Dkt. 33910. The government proved the gain to the jury beyond a reasonable doubt, as AUO and AUOA requested. Thus, AUO and AUOA are estopped from arguing that such proof is insufficient or unconstitutional.

to yield 20 percent. Rather "[i]n cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than ten percent, this factor should be considered in setting the fine *within* the guidelines fine range." *Id*. (emphasis added).

b) Use of the 20 Percent Figure Provides No Sound Basis to Depart from the Guidelines Fine Range

To be sure, the Guidelines are no longer binding, and thus the Court is not bound to sentence within the correctly calculated Guidelines range. *See United States v. Booker*, 543 U.S. 220, 259 (2005); *see also Carty*, 520 F.3d at 990. But the Guidelines remain advisory. The Court must "consider the Guidelines 'sentencing range'" and "the pertinent Sentencing Commission policy statements" along with the other 3553(a) factors.[11] *Booker*, 543 U.S. at 259-60 (citing 18 U.S.C. § 3553(a)(4)(A), (a)(5)); *Carty*, 520 F.3d at 991. Indeed, if a sentencing "judge 'decides that an outside-Guidelines sentence is warranted, [s]he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" *Carty*, 520 F.3d at 991 (*quoting Gall v. United States*, 552 U.S. 38, 50 (2007)). As the Supreme Court explained in *Gall*, "a major departure should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 50.

Nothing about AUO's overcharge or the use of Section 2R1.1(d)(1)'s 20 percent figure justifies departing downward from the Guidelines range. Defendants argue the Court should disagree with the Guidelines' policy of using 20 percent to avoid the time and expense of a judicial determination of the actual gain or loss. PSR Objections at 4. They contend the proposition that such a gain/loss determination is time-consuming or expensive was unsupported when the Guidelines were adopted and is wrong here because defendants claim to have already determined the actual overcharge. *See id*.

The Guidelines' common sense reason for using 20 percent is as sound today as it was at the Guidelines' adoption. As a general matter, it is self-evident that use of a specified figure avoids the time and expense of a judicial determination of an overcharge. And in this case, a judicial determination of the actual gain or loss would require substantial time and expense. The

[11] When imposing a fine, the Court must also considered the factors set forth in 18 U.S.C. § 3572(a).

parties' positions on overcharge—ranging from 1.8 percent to 19 percent—are conflicting, and, as such, do not give the Court a head start. Indeed, as explained below, defendants' 1.8 percent figure is not even a determination of overcharge at all. Thus, a judicial determination would require more time and expense—precisely what the specified 20 percent figure is meant to avoid.

Defendants also apparently contend that the Court should disagree with the Guidelines on policy grounds because "20 percent of the volume of affected commerce" is never a reasonable surrogate for loss from a price-fixing conspiracy. As explained in Application Note 3, "it is estimated that the average gain from price-fixing [*i.e.*, the overcharge] is 10 percent of the selling price," but the Sentencing Commission observed that the loss from price fixing "exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices." U.S.S.G. § 2R1.1 cmt. n. 3. For this reason, the Guidelines direct that "20 percent of the affected commerce is to be used in lieu of the pecuniary loss under § 8C2.4(a)(3)." *Id.*

Defendants do not deny that the loss from price fixing exceeds the gain, but they question the Sentencing Commission's judgment in doubling the average overcharge estimate to account for this additional loss. Defendants apparently believe that this additional loss is limited to loss to final consumers resulting from not purchasing the price-fixed product at its elevated price, which defendants contend could not be as much as loss from paying the overcharge. But this was not the only type of additional loss the Sentencing Commission was considering. Application Note 3, in fact, refers to this type of loss "among other things," making clear that it was aware of other types of loss. *Id*. The Sentencing Commission's approach accounts for this additional loss and allows for the fact that fines tend to be paid well after the losses are inflicted.

Price-fixing conspiracies do cause other injury to consumers, including harm from increased prices on sales of non-conspirators' products and sales of substitute products or in other related markets. Moreover, defendants insist that pass-through must be evaluated at each stage of distribution to determine the harm to consumers. PSR Objections at 5. In fact, the Guidelines require no such evaluation, nor does the Sherman Act. While that statute outlaws anticompetitive conduct for the ultimate benefit of consumers, it "does not confine its protection

to consumers, or to purchasers, or to competitors, or to sellers." *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). Thus, the offense's harm includes all the losses it caused, not just those passed on to consumers.[12]

When it prescribed 20 percent of the affected commerce as the base fine for price-fixing offenses in lieu of pecuniary loss, the Sentencing Commission filled an "important institutional role." *Kimbrough v. United States*, 552 U.S. 85, 109 (2007). AUO has not made the case that the Commission's judgment that the 20 percent figure used in the antitrust Guideline fails to properly reflect § 3553(a) considerations, even in ordinary cases. *Id*. And thus, that judgment cannot be lightly disregarded.

Moreover, this case is not outside the "heartland" to which the Commission intended the relevant Guidelines to apply. *Rita v. United States*, 551 U.S. 338, 351 (2007). Defendants argue that using 20 percent of the affected commerce does not fit the particular facts of this case and that Dr. Hall's 1.8 percent figure better represents the overcharge figure. But Dr. Hall did not conduct an overcharge analysis to reach this number. Rather, he simply divides $17 million (the jury damages award to a limited class of plaintiffs in the civil Toshiba trial) by $939 million (the estimated sales of TFT-LCD panels presented by a limited class of plaintiffs). Since $17 million is 1.8 percent of $939 million, Dr. Hall concludes, without any economic analysis, that the overcharge is 1.8 percent.

In contrast, Dr. Leffler did the empirical work to estimate the overcharge in this case. That work shows that the likely AUO-specific overcharge exceeded the Guidelines' 10 percent overcharge estimate for price fixing. His analyses comparing margins before and after the conspiracy period, including AUO-specific margins, found margins consistent with overcharges well above 10 percent. And his multiple regression analysis found a statistically significant mean estimate of the AUO overcharge on all indictment panels of over 19 percent. Leffler Decl. ¶ 45. Thus, in this case, actual analysis of the overcharge does not provide a reason to depart

[12] Indeed, in civil antitrust suits for damages, the overcharge paid by purchasers to cartel members is a compensable "injury" even if those purchasers passed on much of the overcharge to others. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 487-94 (1968); *see also Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906).

from the Guidelines range. To the contrary, the congruence of the specified 20 percent figure with the actual overcharge and the additional losses demonstrates that the Guidelines fine range for AUO is a particularly apt measure of the nature and seriousness of its offense and the need for just punishment and adequate deterrence. If it errs at all, it advises a range that is too lenient under the facts of this case. The remedy for such an error, as the Guidelines explain, is to sentence at the high end of the range. *See* U.S.S.G. § 2R1.1 cmt. n. 3.

2. AUOA's Guidelines Fine Range Is $842,400,000 to $1,684,800,000

Like its parent, AUOA's base fine is 20 percent of the $ 2.34 billion in affected commerce: $468 million. AUOA's culpability score under Section 8C2.5 is nine. AUOA starts out with five points under Section 8C2.5(a) and receives an additional point under Section 8C2.5(b)(5) because it had more than ten employees and "individuals within high-level personnel"—AUOA's President Hsiung and U.S. Branch Manager Michael Wong—participated in the offense conduct. AUOA receives three more points under Section 8C2.5(e) because its employees engaged in acts of obstruction (and its branch manager instructed an employee to engage in destruction) by destroying documents after learning of a search of its offices by the FBI in December 2006. No factors support a reduction. Based on its culpability score, the base fine multipliers are 1.8 and 3.6. Therefore, AUO's Guidelines fine range is $842,400,000 to $1,684,800,000:

- Base Fine (20% of $2.34 billion) ($ 2R1.1(d)(1) & 8C2.4(b)) — $468 million
- Culpability Score

i.	Base (§ 8C2.5(a))	5
ii.	Involvement in or Tolerance of Criminal Activity (§ 8C2.5(b)(5))	1
iii.	Prior History (§ 8C2.5(c))	0
iv.	Violation of Order (§ 8C2.5(d))	
v.	Obstruction of Justice (§ 8C2.5(e))	3
vi.	Effective Program to Prevent and Detect Violations of Law (§ 8C2.5(f))	0
vii.	Self-Reporting, Cooperation, and Acceptance of Responsibility (§ 8C2.5(g))	0

Total Culpability Score:	9
• Minimum and Maximum Multipliers (§ 8C2.6)	1.8 – 3.6
Minimum and Maximum Fine Range	$842 million to $1.684 billion

Like AUO, AUOA's fine cannot exceed the statutory maximum of $1 billion. But as explained below, *see infra* Sec. VI.C., AUOA is unlikely to be able to pay a fine within the Guidelines range. So long as a $1 billion criminal fine is imposed on AUO and AUO and AUOA are placed on probation and required to adopt the antitrust compliance program proposed below, the government believes fining its subsidiary AUOA is unnecessary. *Id.*

3. H.B. Chen's Guidelines Incarceration Range Is 121 to 151 Months

Chen's Total Offense Level is 32 and his Criminal History Category is I:

i.	Base Offense Level (§ 2R1.1(a))	12
ii.	Volume of Affected Commerce (§ 2R1.1(b)(2)(H))	16
iii.	Total Adjusted Offense Level	28
iv.	Victim–Related Adjustments (§ 3A)	0
v.	Role in the Offense Adjustment (§ 3B1.1(a))	4
vi.	Obstruction Adjustments (§ 3C)	0
vii.	Acceptance of Responsibility (§ 3E1.1(a) and (b))	0
Total Offense Level		32

This results in a Guidelines prison range of 121 to 151 months. Because the statutory maximum term of incarceration for a violation of Section 1 of the Sherman Act (15 U.S.C. § 1)—120 months—falls below the Guidelines range, the statutory maximum becomes the Guidelines sentence for Chen. *See* U.S.S.G. § 5G1.1(a).

The Guidelines fine range for individuals is one to five percent of the affected commerce, but not less than $20,000. U.S.S.G. § 2R1.1(c)(1). Thus, based on the $2.34 billion in affected commerce done by his principal AUO and thus attributable to Chen, *see* U.S.S.G. § 2R1.1(b), his fine range is $23.4 million to $117 million. But because the Sherman Act maximum for individuals is $1 million, 15 U.S.C. § 1, and because the government has not sought to raise the

statutory maximum fine against the individuals under 18 U.S.C. § 3571(d), the maximum fine for Chen is $1 million. *See* U.S.S.G. § 5G1.1(a).

a) Chen Was an Organizer and Leader in the Conspiracy

Chen's adjusted offense level of 28 should be increased an additional four levels because he was "an organizer or leader in a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a) An application note to U.S.S.G. Section 3B1.1 provides:

> Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. . . .

U.S.S.G. § 3B1.1, cmt. 4. These factors support finding Chen was an organizer and leader.

Chen's approval of AUO's participation in the conspiracy was instrumental to the success of the conspiracy and its continuation over five years. At key meetings with other high-level executives at the start of the conspiracy, Chen approved of AUO's participation in the conspiracy and was involved in the planning and operation of the conspiracy. His stamp of approval as the top executive at AUO confirmed to the other companies that AUO was committed to the conspiracy and gave the green light to many below him at AUO to actively participate in the conspiracy to further its success. Witnesses at trial testified that in Taiwanese culture, attendance at meetings by a top executive sends the signal that the meetings are important. Trial Tr. vol. 3 at 672; Trial Tr. vol. 17 at 2987. Chen was the President of the largest of the Taiwan-based TFT-LCD manufacturers. According to trial testimony, all of the CEO meeting attendees were "quite famous in the industry." Trial Tr. vol. 7 at 1332. Had Chen disapproved and AUO not participated, the crystal conspiracy would have disintegrated.

Chen also directly participated in critical, high-level conspiracy meetings where key pricing agreements were reached. He attended at least five CEO-level crystal meetings during

the crucial early part of the conspiracy between October 2001 and December 2002. Trial Exs. 405T, 306T, 330, 449, 308T, 407T, 310T, 411T, 419T.[13]

Throughout the conspiracy, Chen communicated with AUO's conspirators one-on-one outside the crystal meetings and, as the top executive responsible for AUO's sales efforts, ensured that the illegally fixed prices were implemented and charged to AUO's customers. Trial Tr. vol. 17 at 3018, 3037. For example, in July 2004, a call was arranged between Chen and executives at LG on the subject of a "cooperation plan for preventing the recent sharp drop in price" at Dell. Trial Ex. 501T. In January 2005, Chen and Hsiung met with LG's head of TFT-LCD sales to discuss maintaining prices at Dell and HP for TFT-LCDs used in computer monitors. Trial Ex. 505T. And in June 2005, Chen and Hsiung met with him again and agreed to raise the price of TFT-LCDs used in notebook computers $10 per panel in July and August. Trial Ex. 515T ("As for NB Panel, it was agreed to increase by $10 in July and August, respectively"). A report of that meeting further states: "[m]utual collaboration on price is necessary during the period of rapid market change." *Id.*

As AUO's President and Chief Operating Officer, Chen could not have held any greater position of control or authority over other employees at AUO who participated in the conspiracy. Organizationally, all AUO employees, including defendant Hsiung and other AUO participants in the conspiracy reported either directly or indirectly to Chen. Chen blessed his subordinates' attendance at the crystal meetings, ensuring their continuing participation in the conspiracy. These subordinates dutifully provided Chen detailed written reports of the crystal meetings throughout the conspiracy. *See, e.g.*, Trial Exs. 12T, 14T, 16T.

The conspiracy also involved five or more participants. A "participant" is defined in the application notes to U.S.S.G. Section 3B1.1 as "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1, cmt 1. The

[13] Chen was the President and Chief Operating Officer of AUO from October of 2001 until 2007. Prior to that, he had been the President and Chief Operating Officer of Acer Display Technology, the company that merged with Unipac Optoelectronics to form AUO. For a brief period after the merger, the former Unipac executives were in charge of AUO. Thus, Chen and Hsiung did not attend the inaugural crystal meeting that took place on September 14, 2001. But as soon as Chen took over as President the very next month, he and Hsiung began attending crystal meetings.

fact that ten individuals have pled guilty to participating in the conspiracy is sufficient to show that the conspiracy in this case involved five or more participants. In addition, dozens of AUO and AUOA employees directly participated in the conspiracy by attending crystal meetings or engaging one-on-one with conspirators in Taiwan and the United States to discuss pricing. All of AUO and AUOA's participants were subordinates of Chen. He had control and authority over them and was ultimately responsible for their recruitment into the conspiracy. The four-level role-in-the-offense adjustment increases Chen's offense level from 28 to 32.

b) Chen Has Not Accepted Responsibility for Participating in the Conspiracy

Chen should receive no downward adjustment for acceptance of responsibility under U.S.S.G. Section 3E1.1 because it applies only where a defendant "clearly demonstrates acceptance of responsibility." Chen has not demonstrated any contrition or remorse for his conduct. *See United States v. Nielsen*, 371 F.3d 574, 582 (9th Cir. 2004) ("To receive the two-point downward adjustment, a defendant must at least show contrition or remorse."). To the contrary, Chen stated in a letter to AUO employees after conviction, "I still do not regret the decision I made at the beginning. Because it's not only for the company, but also for my personal reputation, I have chosen to fight to the end . . . My mind is full of the thought of 'Fight, keep fighting.'" Ruying Zeng, "Sentenced to Serve in Prison: Personal Letter Written in Tears by AUO Vice Chairman Exposed," Nikkei Tech on-line (April 17, 2012) available at http://www.pc.hc360.com. Declaration of Heather S. Tewksbury ("Tewksbury Decl."), Exhibit B. Any effort by Chen now, after his conviction, to claim any degree of responsibility would be untimely, given that his primary defense at trial was that he never entered into illegal agreements with his competitors to fix prices, an essential element of a Sherman Act violation. *See* U.S.S.G. § 3E1.1 cmt. n.2 ("This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse."); *United States v. Schales*, 546 F.3d 965, 976 (9th Cir. 2008). Accordingly, a downward adjustment for acceptance of responsibility is not available to him.

4. Hui Hsiung's Guidelines Incarceration Range Is 121 to 151 Months

Hsiung's Total Offense Level is 32 and his Criminal History Category is I, resulting in a Guidelines prison range of 121 to 151 months:

i.	Base Offense Level (§ 2R1.1(a))	12
ii.	Volume of Affected Commerce (§ 2R1.1(b)(2)(H))	16
iii.	Total Adjusted Offense Level	28
iv.	Victim–Related Adjustments (§ 3A)	0
v.	Role in the Offense Adjustment (§ 3B1.1(a))	4
vi.	Obstruction Adjustments (§ 3C)	0
vii.	Acceptance of Responsibility (§ 3E1.1(a) and (b))	0
Total Offense Level		32

Because the statutory maximum term of incarceration for a violation of Section 1 of the Sherman Act (15 U.S.C.§ 1)—120 months—falls below the Guidelines range, the statutory maximum becomes the Guidelines sentence for Hsiung. *See* U.S.S.G. § 5G1.1(a).

Like Chen, Hsiung's Guideline fine range is one to five percent of the affected commerce done by his principal, AUO: $23.4 million to $117 million. But because the Sherman Act maximum for individuals is $1 million, 15 U.S.C. § 1, and because the government has not sought to raise the statutory maximum fine against the individuals under 18 U.S.C. § 3571(d), the maximum fine for Hsiung is $1 million. *See* U.S.S.G. § 5G1.1(a).

a) Hsiung Was an Organizer and Leader in the Conspiracy

Like Chen, Hsiung's adjusted offense level of 28 should be increased an additional four levels under U.S.S.G. Section 3B1.1(a) because he was "an organizer or leader in a criminal activity that involved five or more participants or was otherwise extensive."

Many of the same factors supporting this adjustment for Chen support the same four-level upward adjustment for Hsiung, including Hsiung's exercise of his decision-making authority to further the conspiracy, the nature of his participation in the conspiracy, his recruitment of his subordinates at AUO and AUOA to participate in the conspiracy, the significant degree of control and authority he exercised over other participants in the conspiracy, and the fact that the conspiracy involved five or more participants, including the five companies

and ten individuals who have already pled guilty. He was a senior executive at AUO and the president of AUOA. Nearly all of the dozens of AUO participants in the conspiracy, including all the participant employees of AUOA, reported either directly or indirectly to Hsiung. Like Chen, Hsiung had control and authority over these AUO and AUOA participants and was ultimately responsible for recruiting them into, and directing their participation in, the conspiracy. *See, e.g.*, Trial Exs. 15T, 34T. The four-level role-in-the-offense adjustment increases Hsiung's offense level from 28 to 32.

b) Hsiung Has Not Accepted Responsibility for Participating in the Conspiracy

Hsiung should receive no downward adjustment for acceptance of responsibility under U.S.S.G. Section 3E1.1 because that section applies only where a defendant "clearly demonstrates acceptance of responsibility." Like Chen, Hsiung has not demonstrated any contrition or remorse for his conduct. Also, like Chen, Hsiung's primary defense at trial was that he never entered into illegal agreements with his competitors to fix prices, an element of a Sherman Act violation. Therefore, any effort now, after his conviction, to claim any degree of responsibility is untimely. *See* U.S.S.G. § 3E1.1 cmt. n.2; *Schales*, 546 F.3d at 976.

V. RECOMMENDED FINE AND PRISON SENTENCES

The government requests that this Court impose the following sentences: AUO should pay a $1 billion fine; AUO and AUOA should serve a term of probation of five years and implement a comprehensive antitrust compliance program; Chen and Hsiung should each serve a sentence of 120 months incarceration and pay a $1 million fine.

Because Chen is a deportable alien who likely will be deported after imprisonment, the Guidelines recommend that no term of supervised release be imposed following any term of imprisonment. U.S.S.G. § 5D1.1(c). The government requests a term of supervised release of one to three years following any term of imprisonment for Hsiung, who has U.S. citizenship. U.S.S.G. § 5D1.2(a)(2).

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A. AUO Should Receive the Maximum Allowable Fine of $1 Billion

Because the jury found that the conspirators derived gains from the conspiracy of at least $500 million, the most the Court can fine AUO under 18 U.S.C. § 3571(d) is twice that, or $1 billion. AUO should be fined the full amount. The Court is required to "consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant.'" *Booker*, 543 U.S. at 259 (2005) (quoting 18 U.S.C. § 3553(a)(4)(A)); *Carty*, 520 F.3d at 991 ("All sentencing proceedings are to begin by determining the applicable Guidelines range. . . . [T]he Guidelines . . . are to be kept in mind throughout the process."). Here, the Guidelines range is $936 million to $1.872 billion. Even that range is lenient because, as explained above, the volume of commerce figures are conservative and the "actual monopoly overcharge appears to be . . . substantially more" than the ten percent estimated overcharge on which the 20 percent loss figure is based, U.S.S.G. Section 2R1.1 cmt. n.3. *See supra* Sec. IV.A.2. This would normally counsel for a fine at the high end of the range, but in this case the Court is constrained by the $1 billion statutory maximum under 18 U.S.C. § 3571(d). Thus, a $1 billion fine is the maximum allowable fine.

Along with the Guidelines range, the Court must also consider the other factors set forth in 18 U.S.C. § 3553(a) and 18 U.S.C. § 3572(a). The Court need not address each factor explicitly as long as the record as a whole indicates that the Court considered the factors. *United States v. Eureka Laboratories, Inc.*, 103 F.3d 908, 913-14 (9th Cir. 1996). To the extent those factors apply here, they support the sentence recommended by the government. We address them in turn below.

1. The Nature and Circumstance of the Offense and the History and Characteristics of AUO Support the Recommended Fine

The "nature and circumstance of the offense and the history and characteristics of the defendant" support a $1 billion fine. *See* 18 U.S.C. § 3553(a)(1). Price-fixing cartels represent a frontal assault on our regime of competition, which the Supreme Court has called "the fundamental principle governing commerce in this country." *City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978). Such conspiracies "have manifestly

anticompetitive effects and lack . . . any redeeming virtue." *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal quotations and citations omitted). Price fixing is "the supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Cartel activity is "properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs consumers and other market participants of the tangible blessings of competition." Gregory Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 European Competition J. 19, 24 (2009). In recognition of this "profoundly harmful impact that antitrust violations have on consumers and the economy," Congress increased the criminal penalties for violation of the Sherman Act in 2004. 150 Cong. Rec. S3610-02, S3614 2004 WL 714783, *18 (statement of Sen. Hatch).

As for AUO's "history and characteristics," the company has been engaged in felonious conduct from its inception. The very month that AUO was formed, representatives of the company attended its first meeting with its competitors, where AUO's highest-level executives agreed with the other major TFT-LCD panel manufacturers to engage in a conspiracy to stabilize prices in the LCD market. AUO continued to participate in the conspiracy until its U.S. subsidiary was searched by the FBI in December 2006. Since that time, while every other conspiracy participant—Samsung, LG, CPT, CMO, and HannStar—has come forward and accepted responsibility, AUO has repeatedly and publicly refused to accept any responsibility for its participation in this scheme. From its inception to this day, AUO's corporate culture encouraged collusion, and it has not only refused to accept responsibility for its participation in this conspiracy, but it has continued to issue public statements denying its participation in this conspiracy.

2. The Recommended Sentence for AUO Would Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment for the Offense

The sentence imposed should also "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). As noted in the legislative history of the Sentencing Reform Act, this "is another way of saying

that the sentence should reflect the gravity of the defendant's conduct. From the public's standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense . . . ." S. Rep. No. 98-225, at 75-76 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3258-59. As noted above, this case represents the most harmful, egregious antitrust conspiracy ever prosecuted by the United States. This price-fixing conspiracy was especially reprehensible because of its nearly unprecedented scale, affecting tens of billions of dollars in U.S. commerce. The sentence recommended by the government for AUO reflects that harm and ensures that AUO is justly punished. Anything less raises the prospect that AUO will have managed to retain a portion of its ill-gotten gains.

3. The Recommended Sentence Is Necessary to Afford Adequate Deterrence

A $1 billion fine is also necessary "to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). General deterrence is "the primary goal of criminal antitrust enforcement." United States Sentencing Commission: Unpublished Public Hearings, 1986 volume, at 4 (July 15, 1986) (statement of Douglas H. Ginsburg, Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice); U.S.S.G, § 2R1.1, cmt. background (1987) (stating that "general deterrence" is the "controlling consideration underlying [the Antitrust] Guideline."). The doctrine of general deterrence "boasts an impressive lineage, was long-recognized at common law, and continues to command near unanimity . . . among state and federal jurists." *United States v. Barker*, 771 F.2d 1362, 1368 (9th Cir. 1985) (internal quotes omitted); *see also* S. Rep. No. 98-225, at 76 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3259 (One of the primary purposes of sentencing under the Sentencing Reform Act "is to deter others from committing the offense.").

Deterrence "is particularly important in the area of white collar crime." S. Rep. No. 98-225, at 76 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3259. "Because economic and fraud-based crimes are 'more rational, cool, and calculated than sudden crimes of passion or opportunity,' these crimes are 'prime candidate[s] for general deterrence.'" *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (quoting Stephanos Bibas, *White-Collar Plea*

Bargaining and Sentencing After Booker, 47 Wm. & Mary L. Rev. 721, 724 (2005)). And because defendants in white collar crimes "often calculate the financial gain and risk of loss," such crimes "therefore can be affected and reduced with serious punishment." *Id.* Moreover, there is no risk of over-deterrence, because antitrust cartels serve no legitimate purpose and are never efficient or otherwise socially desirable.[14] As Judge Richard Posner explained, criminal sanctions "are not really prices designed to ration the activity; the purpose so far as possible is to extirpate it." Richard A. Posner, *An Economic Theory of Criminal Law*, 85 Colum. L. Rev. 1193, 1215 (1985).

The corporate fine in this case is capped at $1 billion by 18 U.S.C. § 3571(d), which allows for fines of twice the gain found by the jury (here, at least $500 million). The Guidelines fine range of $936 million to $1.872 billion for AUO is based on an assumed 10 percent overcharge, which is doubled and applied to the affected volume of commerce. The use of 20 percent is necessary from the standpoint of judicial efficiency, and, as explained above, there is no reason to suspect that it overstates the loss caused by AUO's conduct or the seriousness of the offense.

A fine of the magnitude recommended by the government is necessary in order to provide adequate deterrence. To have a deterrent effect, fines must be large enough that they are not merely considered a cost of doing business. *See* S. Rep. No. 98-225, at 107 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3289 ("[C]ertainly no correctional aims can be achieved where the maximum sentence imposable is set at such a low level that it can be regarded merely as a cost of doing business—a cost that may in fact be more than offset by the gain from the illegal method of doing business."). In the language of economics, "the sanctions imposed on cartel participants must produce sufficient disutility to outweigh what the participants expect to gain from the cartel activity." Werden, *Sanctioning Cartel Activity*, at 24. That many conspiracies will go

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[14] In fact, although fines of at least $100 million have been imposed on cartel participants 20 times—including a $500 million fine levied against F. Hoffman-LaRoche, Ltd. in 1999—these substantial penalties have not succeeded in deterring cartels like this one. All fines of $10 million or more for Sherman Act violations are listed on the Antitrust Division's website, http://www.justice.gov/atr/public/criminal/sherman10.pdf.

undetected must also factor into the fine calculation. To adequately deter cartel conduct, fines must be high enough to overcome the effect that the low probability of detection and successful prosecution have on predicted outcomes.[15]

4. The Recommended Sentence Does Not Result in Unwarranted Disparities

The government's recommended sentence does not create "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). To the contrary, any disparity here is fully justified by the differences between AUO and its corporate coconspirators. While this factor seeks to promote national uniformity in sentencing by treating similarly situated defendants similarly, it does not require uniformity of sentencing among co-defendants within the same case. *United States v. Green*, 592 F.3d 1057, 1072 (9th Cir. 2010); *United States v. Saeteurn*, 504 F.3d 1175, 1181 (9th Cir. 2007). Nor is it designed to eliminate all sentence disparities, only *unwarranted* sentence disparities. And even unwarranted disparities will "not render [defendants'] sentences unreasonable." *United States v. Marcial-Santiago*, 447 F.3d 715, 719 (9th Cir. 2006) (stating that "the need to avoid unwarranted sentencing disparities is only one factor a district court is to consider in imposing a sentence.").

As an initial matter, the Guidelines, by linking sentences to the volume of affected commerce, capture the scope and duration of the crime and thus provide a built-in mechanism to ensure basic parity. Thus, a sentence within the Guidelines range satisfies § 3553(a)(6). As the Ninth Circuit stated in a case in which a defendant challenged his Guidelines sentence, "avoidance of unwarranted disparities was clearly considered by the Sentencing Commission when setting the Guidelines ranges. Since the District Judge correctly calculated and carefully reviewed the Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities." *United States v. Treadwell*, 593 F.3d 990, 1011 (9th Cir.

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[15] One recent report suggests that fines as high as $3 billion may yet be inadequate to offset the rewards of certain unlawful conduct. *See Fine and Punishment*, The Economist, July 21, 2012, at 64 (concluding, "the economics of crime suggest that fines imposed by regulators may need to rise still further if they are to offset the rewards from lawbreaking."). Tewksbury Decl., Ex. A.

2010) (internal quotations omitted); *see also United States v. Becerril-Lopez*, 541 F.3d 881, 895 (9th Cir. 2008) ("[W]e have trouble imagining why a sentence within the Guideline range would create a disparity."). Accordingly, "when a district court imposes a within-Guidelines sentence, the explanation of its decision-making process may be brief." *United States v. Carter*, 560 F.3d 1107, 1117 (9th Cir. 2009).

While other participants in the TFT-LCD conspiracy received lower sentences than those recommended here, those other sentences are inappropriate benchmarks because those other defendants are not similarly situated. *See United States v. Fernandez*, 443 F.3d 19, 32 (9th Cir. 2009) (holding that a disparity between non-similarly situated defendants is not a valid basis for a claim of error under 18 U.S.C. § 3553(a)(6)).

First, all other defendants who have been sentenced in this case pled guilty. Their sentences are inapt benchmarks for a defendant who proceeds to trial. It is axiomatic that defendants who plead guilty typically receive more lenient treatment. *Carter*, 560 F.3d at 1121 ("[T]he government may encourage plea bargains by affording leniency to those who enter pleas."); *United States v. Murphy*, 65 F.3d 758, 763 (9th Cir. 1995) ("The government may offer either reduced charges or its recommendation of a lenient sentence for the defendant to plead guilty."); *United States v. Winters*, 278 Fed. Appx. 781, 783, 2008 WL 2080732, 1 (9th Cir. 2008) (stating that a "necessary corollary of plea bargaining is that defendants who go to trial may receive greater sentences than similarly situated defendants who do not.").

The Ninth Circuit recognizes that if sentencing judges were to reduce the sentences of those found guilty at trial in an attempt to normalize them with the sentences of those who voluntarily pled guilty, it would tend to discourage the government from offering plea deals, an outcome which courts are to avoid on judicial efficiency grounds. *See United States v. Reina-Rodriguez*, 468 F.3d 1147, 1158 (9th Cir. 2006), *overruled in part on separate grounds* by *United States v. Grisel*, 488 F.3d 844, 851 (9th Cir. 2007); *United States v. Meija*, 953 F.2d 461, 468 (9th Cir. 1992); *United States v. Enrique-Munoz*, 906 F.2d 1356, 1359 (9th Cir. 1990).

Second, other corporate defendants who have pled in this case received lesser fines because they accepted responsibility for their conduct. AUO, on the other hand, is unrepentant.

A sentencing reduction based on acceptance of responsibility is not an "unwarranted disparity." *United States v. Corona-Verbera*, 509 F.3d 1105, 1120 (9th Cir. 2007) (disparity between defendant who accepted responsibility and defendant who went to trial did not render sentence unreasonable); *Winters*, 278 Fed. Appx. at 783, 2008 WL 2080732, 1 (9th Cir. 2008) (same). Downward departures for acceptance of responsibility for those who plead guilty does not infringe on the constitutional right to trial. *United States v. LaPierre*, 998 F.2d 1460, 1468 (9th Cir. 1993) ("If there is insufficient evidence to establish acceptance of responsibility, denial of a reduction is appropriate. This is so even if the lack of evidence results from the exercise of constitutional rights."); *United States v. Davis*, 960 F.2d 820, 829-30 (9th Cir. 1992); *United States v. Gonzales*, 897 F.2d 1018, 1021 (9th Cir. 1990).

Third, all other defendants sentenced in this case, unlike these defendants, cooperated with and substantially assisted the government's investigation and prosecution of the crime. They received significant downward departures from their Guidelines sentences for their cooperation. All of the others defendants sat for interviews or, in the case of corporate defendants, made employees available for interviews with the government. Those who were interviewed gave facts, provided leads, explained documents, and implicated coconspirators. Some of the cooperating defendants testified at trial. Such cooperation from cartel insiders is extraordinarily valuable in the investigation and prosecution of price-fixing conspiracies, which, by their nature, are secretive and operate in the shadows. The government relies heavily on this sort of cooperation to break up cartels, and it is worthy of the significant downward departures given by this Court. It would be inappropriate to use the sentences of the cooperating defendants as a benchmark for these defendants. Such benchmarking would be highly inequitable to the pleading defendants because it would allow these convicted defendants to derive a benefit from the timely acceptance of responsibility and valuable cooperation of the pleading defendants. "In most cases, it will be inappropriate for a sentencing court to give a non-cooperating defendant the benefit of his co-defendant's cooperation." *United States v. Caperna*, 251 F.3d 827, 831-32 (9th Cir. 2001); *Carter*, 560 F.3d at 1121 ("[A] sentencing disparity based on cooperation is not unreasonable.").

Fourth, all other defendants sentenced in this case were sentenced while the investigation was still ongoing and before the government had an opportunity to completely analyze the effect of the conspiracy. The prior sentences for both corporations and individuals were based on volume-of-affected-commerce figures estimated from the data available at the time. Since then, the government has collected additional data and retained and worked extensively with an outside economic expert. The sentences that the government now recommends for these defendants are the product of a much more complete, rigorous, and detailed calculation of the volume of affected commerce. This is an additional reason that those earlier sentences are not a valid benchmark for the defendants currently before the Court. In sum, other defendants who pled in this case are not similarly situated to AUO, and therefore their sentences cannot support any unwarranted disparity claim.

If the government is correctly reading the report of AUO's expert and the objections to the Probation Department's preliminary PSR, AUO proposes that its fine be calculated based on an overcharge of 1.89 percent rather than the 20 percent figure called for by the Guidelines and that was used for purposes of calculating the fines of those corporations that pled guilty. It then proposes that this figure be applied to a volume of commerce figure of $224 million for a fine of $4.2 million. Aside from the flaws in AUO's figures, which are dealt with elsewhere in this memorandum, the fine AUO proposes is dramatically less that that paid by the pleading companies—LG: $400 million; CMO: $220 million; CPT: $65 million; and HannStar $30 million—despite the fact that those other companies pled guilty, accepted responsibility, and cooperated with the government's investigation and prosecution. Considering AUO's circumstances, the government's recommended fine is proportionate to the fines already handed down in this case, while AUO's proposal would create a truly unwarranted disparity.

5. To Protect the Public from Further Crimes of AUO and to Provide AUO with Needed Training, AUO Should Be Placed on Five Years' Probation and Be Required to Implement an Effective Antitrust Compliance Program

The Court should consider the need for the sentence imposed "to protect the public from further crimes of the defendant" and "to provide the defendant with needed educational or . . .

other correctional treatment in the most effective manner." 18 U.S.C. §§ 3553(a)(2)(C) & (D). To satisfy these factors, the government further recommends that as part of its probation (which is mandatory in this case under U.S.S.G. Section 8D1.1(a)(3)(6)) AUO be required to hire a compliance monitor to develop and implement an effective antitrust compliance program. As set forth in more detail in section VI. below, this condition of probation is recommended under U.S.S.G. Sections 8D1.4(b)(1) & (2) and is critical for AUO, which, as noted above, has engaged in illegal conduct from its inception.

6. Restitution Is Not Necessary

The Court should consider "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(7). The government does not recommend restitution in this case because there are many victims and the process of determining the appropriate restitution for each would be very complex and would significantly lengthen and unduly complicate the sentencing process. U.S.S.G. § 8B1.1(b)(2). Moreover, the victims of this conspiracy are pursuing recovery for their harm through private civil actions before this Court; most have already reached settlements with AUO after conviction.

7. 18 U.S.C. § 3572(a) Factors Support the Recommended Fine for AUO

The Court should also consider in its fine determination: (1) the defendant's "income, earning capacity, and financial resources," (2) "the burden that the fine will impose on defendant" and any person financially dependent on the defendant, (3) the "pecuniary loss inflicted on others as a result of the offense," (4) "whether restitution is ordered," (5) "the need to deprive the defendant of illegally obtained gains from the offense," (6) "the costs to the government," (7) "whether defendant can pass on to the consumers" the expense of the fine, and (8) "the size of the organization and any measure taken by the organization to discipline" employees responsible for the offense "and prevent a recurrence of such offense." 18 U.S.C. § 3572(a)(1) - (8). These factors support the requested fine against AUO.

Public records show that AUO has the "income, earning capacity, and financial resources" to pay the fine recommended by the government. According to its SEC filings, AUO had net sales in 2011 of over $12.5 billion, total assets of over $19.6 billion, current assets of

over $6.6 billion, and cash or cash equivalents of approximately $3 billion. Thus, there is little question that AUO has the financial resources to pay the recommended fine, either in a lump sum or, if necessary, in installment payments. *See* U.S.S.G § 8C3.2 (b).

AUO cannot avoid a fine by claiming that the fine will impose a burden on it or persons financially dependent on it. 18 U.S.C. § 3572(a)(2). This factor does not even appear to apply to corporate fines. *Eureka Labs, Inc.*, 103 F.3d at 914 ("[T]he language of section 3572(a)(2) seems to refer to dependent family members of an *individual* defendant, not the employees of a *corporate* defendant.") (emphasis added). In any event, "[c]orporations always have employees who could be affected by the imposition of a corporate fine. This fact alone cannot allow a corporation that has engaged in illegal activity to escape paying a fine." *Id.*

AUO's offense inflicted widespread "pecuniary losses" upon others (18 U.S.C. § 3572(a)(3)) and resulted in huge "illegally obtained gains" for AUO (18 U.S.C. § 3572(a)(5)), which support the requested fine. This was a long-lasting conspiracy that victimized huge swaths of consumers and yielded significant ill-gotten gains for AUO.

If the Court imposes the term of probation requested by the government, including the compliance monitor, there will be some costs to the government (18 U.S.C. § 3553(a)(6)), which is another factor supporting the recommended fine.

AUO is unlikely to be able to "pass on to consumers" the expense of a fine (18 U.S.C. § 3572(7)). Presumably the government's prosecutions and private civil cases have resulted in a competitive market for TFT-LCD panels. In such a market, AUO would have limited ability to pass the expense of the fine on to consumers.

Lastly, AUO is a large organization which did not take any measures to discipline those responsible for the offense. 18 U.S.C. § 3572(a)(8). Indeed, it continues to employ convicted felons and indicted fugitives. H.B. Chen continues to serve as AUO's Vice-Chairman. AUO also employs indicted fugitives who continue to have a sales function within the company.

B. AUOA Should Be Put on Probation

As described at trial by AUOA's former branch manager, AUOA essentially functions as a "tentacle" of AUO in the United States. Thus, AUOA is as culpable as AUO and is deserving

of stiff punishment, and AUO could legally be held responsible for AUOA's criminal fine under an alter ego theory. But the government recognizes that AUOA has been left undercapitalized by AUO and lacks the financial ability to pay a significant criminal fine. Accordingly, the government believes that adequate deterrence, punishment, protection of the public, and education of defendant can be achieved if (1) a $1 billion criminal fine is imposed on AUO, and (2) AUO and AUOA are placed on probation and, as discussed below, required to adopt the antitrust compliance program the government proposes. Under those circumstances, the government would recommend that the Court not impose a criminal fine on AUOA. The government also recommends no restitution obligation for AUOA for the same reasons it is not necessary for AUO.

C. Chen and Hsiung Should Be Imprisoned for 120 Months and Fined $1 Million

Based on Chen and Hsiung's active leadership role in the conspiracy, their refusal to accept responsibility or show remorse, and the volume of commerce affected by this conspiracy, the Guidelines suggest a custodial sentence of between 121 and 151 months for each of them. *See* Section IV.B.3 and IV.B.4, above. Because the Sherman Act maximum falls below that range, the statutory maximum becomes the Guidelines sentence. *See* U.S.S.G. § 5G1.1(a). The Court is to give the Guidelines sentence of 120 months considerable weight. A Guidelines sentence "significantly increases the likelihood that the sentence is a reasonable one." *Rita*, 551 U.S. at 347. Any deviation outside that sentence must be "sufficiently compelling to support the degree of the variance." *Carty*, 520 F.3d at 991 (en banc) (quoting *Gall*, 552 U.S. at 50).

No departures below the Guidelines sentence of 120 months are warranted for either Chen or Hsiung. Nor do the factors under 18 U.S.C. § 3553(a) support any departure or variance below the Guidelines sentence. Rather, the sentencing factors enumerated in 18 U.S.C. § 3553(a) support a 120-month sentence.

1. The Nature and Circumstances of the Offense and History and Characteristics of Chen and Hsiung Support the Guidelines Sentences

Because violations of the antitrust laws are serious offenses, Congress increased the maximum prison terms for antitrust violators from three to ten years. Antitrust Criminal Penalty

Enhancement and Reform Act of 2004, Pub. L. 108-237 (2004). In response to the new statutory maximum, the Sentencing Commission amended the antitrust guidelines, effective November 1, 2005, by raising the base offense level for antitrust offenses from level 10 to level 12 (U.S.S.G. § 2R1.1(a)) and by increasing the volume of commerce table (U.S.S.G. § 2R1.1(b)(2)). Chen and Hsiung are the first individuals to be sentenced in a contested proceeding for participating in an international cartel under this increased penalty regime.[16]

The increased maximum sentences reflect both that criminal antitrust violations are serious, white-collar crimes like mail and wire fraud and that additional penalties are necessary to deter large-scale cartels, like this one, that affected tens of billions of dollars of commerce. Congress intended to send a message to antitrust offenders: "if they are caught they will spend much more time considering the consequences of their actions within the confinement of their prison cells." 150 Cong. Rec. H3657 (daily ed. June 2, 2004) (statement of Rep. Sensenbrenner). As Senator Kohl noted, "criminal antitrust violations, crimes such as price fixing and bid rigging, committed by business executives in a boardroom are serious offenses that steal from American consumers just as surely as does a street criminal with a gun." 150 Cong. Rec. S3610-02, S3615.

In some ways the white-collar price fixer is more blameworthy than the common criminal. White collar criminals, like Chen and Hsiung, are often in less desperate circumstances when they commit their crimes than a typical offender. When sentencing two price fixers, Judge Bennett of the Northern District of Iowa observed that a "crime of fraud by one who already has more than enough—and who cannot argue that he suffered a deprived or abusive childhood or the compulsion of an expensive addiction—is simply a crime of greed." *United States v. VandeBrake*, 771 F. Supp. 2d 961, 965, 1006 (N.D. Iowa 2011) (internal citations and quotations omitted), *aff'd*, 679 F.3d 1030 (8th Cir. 2012). And yet "[b]ecause of the nature of their crimes, white-collar offenders are uniquely positioned to elicit empathy from a sentencing court. District

[16] Because this conspiracy operated, in part, when the new Guidelines were in effect, it is governed by them. *See United States v. Portland*, 109 F.3d 534, 546 (9th Cir. 1997) ("We have also required that all continuing offenses be sentenced under one Guidelines manual: the later one."); *United States v. Bracy*, 67 F.3d 1421, 1434 (9th Cir. 1995) ("[C]ontinuing offenses, like conspiracy, which are initiated before, but not concluded until after the effective date of the Guidelines, are subject to sentencing under the Guidelines."); *accord United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1242 (D. Mont. 2006).

courts sentencing white collar criminals can more often identify with the criminal . . . . But, socioeconomic comfort with a criminal convict is not a sufficient reason to show leniency." *United States v. Edwards*, 622 F.3d 1215, 1216-17 (9th Cir. 2010) (dissent of Judges Gould, Bybee, Callahan, and Bea).

Letters attesting to Chen and Hsiung's integrity, character, and respect within the community have been submitted to the Court. But Chen and Hsiung were convicted for what they did, not who they are. They are high-level executives at a major corporation, which is ordinarily a prerequisite position to fix prices on a significant scale. As high-level executives with public profiles and significant wealth, they may have respect within the community and the means to engage in philanthropy, which is hardly unusual for persons in that position. And like the vast majority of price fixers, they have no prior criminal record. These characteristics and histories, however laudable, are shared by most price-fixing defendants. They provide no reason to depart downward from the Guideline sentences because the antitrust guideline accounts for such a typical offender. *See Carter*, 560 F.3d at 1121-22 (9th Cir. 2009) (observing that a defendant's prior history and circumstances must be so "atypical as to put [the defendant] outside the 'minerun of roughly similar' cases considered by the Sentencing Commission in formulating the Guidelines"); *see also* U.S.S.G. § 5H1.11 ("Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.").

More importantly, and ironically, their sterling reputations legitimized the conspiracy in the eyes of their subordinates and their coconspirators. Because of their positions, Chen and Hsiung had a special responsibility. They could have stood up in the group crystal meetings and said: "This is wrong. We should not be meeting in secret. We are competitors. We should be competing, not colluding." They could have rebuffed their competitor's bilateral price-fixing discussions rather than embracing them. They could have made clear that anticompetitive contacts with other panel manufacturers were not going to be tolerated at AUO. Had they chosen that path, the conspiracy would have failed. Instead, they consciously decided, over and over—from the very formation of their company until the conspiracy was detected—to cheat.

Rather than using the power of their high offices and their personal influence as well-respected industry leaders to stop the conspiracy, they used those characteristics to perpetuate and strengthen it.

2. 120-Month Sentences Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment

Chen and Hsiung were both organizers and leaders of the TFT-LCD conspiracy. Only a significant term of incarceration will constitute a just sentence for them and help engender respect for the antitrust laws and the United States criminal justice system. Indeed, if any case calls for the maximum term of imprisonment, it is this one.

In this case, Chen and Hsiung have shown no remorse for their leadership and active participation in conspiracy, nor for their approval and recruitment of subordinates into the illegal conspiracy. Also, both defendants have provided no reason to believe that they would not engage in the same illegal activity again if given the opportunity. In fact, their attempts at trial to justify their illegal activity and to claim that AUO's participation in the monthly crystal meetings actually promoted price competition show the risk that they might, in fact, commit the same crime again.

3. 120-Month Jail Terms Are Necessary to Provide Deterrence

The maximum term of incarceration for price fixing under the Guidelines was increased in 2005 to allow sentences that can deter large-scale, highly profitable cartels like this one. Evidence from this case shows the necessity of 120-month sentences here.

As noted above, the conspirators became aware of the DRAM conspiracy. Stanley Park of LG testified at trial that he even raised the DRAM investigation at a crystal meeting called by Hsiung in July 2004. Trial Tr. vol. 13 at 2241-42, 2246-48; Trial Ex. 431. And the conspirators were warned during that meeting not to "leave traces" of the conspiracy. *Id.* While the DRAM investigation was enough to make the TFT-LCD conspirators take notice and redouble their concealment efforts, it failed to deter them from their criminal conduct. The goal of deterrence is not simply to make perpetrators nervous about their criminal behavior, but to make them

abandon it. The Guidelines' combination of lengthy jail terms, fines, and probation now provide the Court with the tools necessary for real deterrence.

For wealthy corporate executives like Chen and Hsiung, significant prison sentences are an even more effective deterrent than significant fines. The legislative history of the Sentencing Reform Act notes that for white collar crimes, "the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance." S. Rep. No. 98-225, at 91-92 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3274-75. As a "very senior corporate executive" once told a top antitrust enforcer, "as long as you are only talking about money, the company can at the end of the day take care of me . . . but once you begin talking about taking away my liberty, there is nothing that the company can do for me." Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid Rigging*, 69 Geo. Wash. L. Rev. 693, 705 (2001). Employees have been known to expose themselves and their employers to enormous risk in the pursuit of profit for the employer. The risk of incarceration will help deter such behavior.

Because of the size and scope of this conspiracy, the calculated Guidelines range is 121 to 151 months. In this case, though, the Sherman Act maximum prison term lowers the Guideline sentence to 120 months. If ever there were a case calling for the Sherman Act maximum prison term, this is it. The antitrust bar, criminal bar, and the business community have watched this case closely. A Guidelines sentence for each of these convicted felons would reverberate throughout the business world and would cause other business executives to think twice before they entered into a price-fixing conspiracy that victimized U.S. businesses and consumers.

In addition, the threat of a significant term of incarceration facilitates detection and prosecution of cartels by providing cartelists with a powerful incentive to self-report and cooperate with authorities in exchange for reduced sentences.

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4. Guideline Sentences for Chen and Hsiung Do Not Create Unwarranted Disparities

The recommended sentences would not create any unwarranted sentencing disparities. No other individual defendants have been sentenced in a contested proceeding for participating in an international cartel under the increased penalty regime. Accordingly, there are no other sentences that can be used as benchmarks.

The sentences of individuals who have pled guilty for participating in other Sherman Act conspiracies are not appropriate benchmarks. To the extent that those sentences were the result of negotiated plea agreements (representing the vast majority of Sherman Act sentences), the individuals accepted responsibility and provided assistance to the government and their situations are not comparable for all of the reasons set forth in Section V.A.(4) above.

Chen and Hsiung were leaders and organizers of the largest, most egregious antitrust conspiracy that the Department of Justice has ever prosecuted. This alone sets them apart from the defendants in other price-fixing and bid-rigging cases. The TFT-LCD conspiracy was a blatant and long-running cartel that affected products used in almost every household, business, school, and government office in the United States and ultimately victimized huge numbers of American consumers.

5. Chen and Hsiung Should Each Be Fined $1 Million

Chen and Hsiung each have a Guidelines fine range of $23.4 million to $117 million. The statutory maximum fine for individuals convicted of a Sherman Act offense, however, caps the fine at $1 million. Thus, even a fine at the statutory maximum represents a significant departure from the Guidelines fine range.

The § 3572(a) factors also support the requested fines. Both Chen and Hsiung have considerable financial resources that would allow them to pay a $1 million fine. 18 U.S.C. § 3572(a)(1). The PSRs indicate that Chen and Hsiung have cash and cash equivalents and additional unencumbered assets sufficient to pay the $1 million fine. Both Chen and Hsiung are clear examples of the Sentencing Commission's belief that "most antitrust defendants have the

resources and earning capacity to pay the fines called for by this guideline, at least over time on an installment basis." U.S.S.G. § 2R1.1(c)(1) (background to application notes).

The other § 3572 factors also support the requested fines. Given their substantial wealth, and the fact that their children are adults, the fines will not impose a significant burden on them or their dependents. 18 U.S.C. § 3572(a)(2). As noted above, their offense inflicted huge pecuniary losses on others. 18 U.S.C. § 3572(a)(3). The government is not requesting restitution. 18 U.S.C. § 3572(a)(4).

VI. RECOMMENDATION FOR PROBATION AND THE APPOINTMENT OF A COMPLIANCE MONITOR

Probation is prescribed by Section 8D1.1 and is necessary "to protect the public from further crimes of the defendant" and "to provide the defendant with needed educational or . . . other correctional treatment in the most effective manner." 18 U.S.C. §§ 3553(a)(2)(C) & (D). In order to protect the public from further antitrust violations by AUO, the government urges the Court to require as a condition of probation that AUO and AUOA hire a compliance monitor to develop and implement an effective antitrust compliance program. This condition of probation is recommended by Section 8D1.4(b)(1) and (2) and is critical for AUO and AUOA.

A. The Guidelines Support Placing AUO on Probation

The Guidelines set forth the circumstances under which probation "shall" be ordered. U.S.S.G. § 8D1.1(a). Several of the circumstances mandating probation are present here. First, AUO has more than 50 employees and clearly does not have an effective antitrust compliance program, mandating probation under U.S.S.G. Section 8D1.1(a)(3). While AUO apparently claims to have adopted (or to be in the process of developing) such a program, it is not effective. The company refuses to recognize the illegality of its conduct even after being convicted. Thus, whatever its antitrust compliance program might include, it apparently does not condemn the very conduct at issue here. AUO joined the conspiracy from the very beginning of its existence, has no history of lawful conduct or antitrust compliance, continues to employ convicted price fixers and indicted fugitives, some of whom are still employed as leaders of the company, and has made public statements in defiance of the Court's jurisdiction and the jury's

verdict in this case. Probation is necessary to ensure that changes are made to the corporate culture and operations of AUO to reduce the likelihood of future criminal conduct. *See* U.S.S.G. § 8D1.1(a)(6). Absent such a change, there is a meaningful risk that AUO and its many affiliated companies, including those involved in burgeoning industries such as the solar industry, will continue AUO's normal (and illegal) course of conduct.

B. AUO Should Be Required to Retain a Compliance Monitor and Develop an Effective Antitrust Compliance Program

When a convicted company is placed on probation, one of the recommended conditions is to require it to develop an effective compliance and ethics program and then notify its employees and shareholders about that program. U.S.S.G. § 8D1.4(b)(1) and (2). Rarely has a company needed an effective antitrust compliance program as much as AUO.

AUO was founded by a merger in September 2001, and AUO and its coconspirators started the TFT-LCD conspiracy that very same month. So, from its very inception, AUO's standard operating procedure has been collusion. AUO has never known any other way of doing business and has never willingly operated lawfully. That being the case, one cannot expect AUO to reinvent itself and begin to operate legitimately for the first time in its existence on its own, especially when it maintains to this day that it has done nothing wrong. A new corporate culture must be created, and AUO has neither the will nor the experience to institute these new business practices on its own. More importantly, AUO's defiant public statements demonstrate that the company has no intention or motivation to do so. While all of the other corporate conspirators recognized the illegality of their conduct and accepted responsibility for their participation in the illegal scheme, AUO refuses even to acknowledge that its participation in that same scheme is, or should be, illegal. As a result, there is no reason to assume that its conviction and the imposition of a criminal fine, alone, will cause AUO to cease engaging in collusive practices.

For this reason, U.S.S.G Section 8D1.4(b)(1) and (2) recommends that convicted companies be required to adopt an effective corporate compliance and ethics program. The government has proposed the elements for a comprehensive antitrust compliance program

consistent with those described in U.S.S.G. Section 8B2.1 that it recommends be imposed on AUO. Tewksbury Decl., Ex. C.

AUO cannot be expected to develop and implement an effective compliance program. Nor should the Court or the Probation Office be expected to do so. Accordingly, the government recommends that AUO be required to hire (at its own expense) an experienced, independent antitrust attorney as a compliance monitor to review its current compliance program and to ensure that AUO develops a program containing the recommended elements. This is the most reasonable, efficient, and effective way to accomplish the vital task of creating a legitimate, non-criminal business culture at AUO for the first time and thereby create a foundation for good corporate citizenship and a necessary safeguard against future collusion.

Requiring a compliance program will require some involvement by the Probation Office in the appointment of a compliance monitor, but thereafter would require minimal oversight by the Probation Office and actually relieve the Probation Office of much of the burden of directly monitoring AUO during the probation period. The appointment of compliance monitors to develop and implement compliance programs for companies engaged in illegal conduct is commonly required by the Department of Justice in deferred prosecution agreements, and the same considerations support that process here. *See also* U.S.S.G. §§ 8B2.1, 8D1.4(b)(1),(2).

C. AUOA Should Also Be Placed on Probation and Required to Appoint a Compliance Monitor to Develop an Effective Antitrust Compliance Program

The government recommends that this Court sentence AUOA to five years of probation conditioned on the same requirement that it implement a comprehensive antitrust compliance program. The probation is prescribed by U.S.S.G. Section 8D1.1(a)(6),(7). AUOA was engaged in this conspiracy for much of its existence, had no antitrust compliance program whatsoever during the relevant period, has an inherent business culture of collusion, and needs the oversight of probation to ensure that changes are made within the organization to prevent future criminal conduct. Certainly, AUOA cannot look to its parent, AUO, for lessons in how to conduct its operations lawfully. Moreover, nothing in its post-conviction conduct or statements suggests

that AUOA recognizes the seriousness and unlawful nature of its conduct or that it plans to change the way it conducts business.

More importantly, because AUOA cannot pay a significant criminal fine due to the way in which AUO and AUOA have structured their business operations, the imposition of probation, the retention of a compliance monitor, and the development and implementation of an effective antitrust compliance program are important for changing AUOA's corporate culture and preventing future misconduct. The government believes that applying the same compliance program to AUOA as recommended for AUO is sufficient. It also believes that appointing the same monitor for AUOA would be the most efficient use of resources, and would further ease the burden on the Probation Office by having only one monitor responsible for reporting to the Probation Office.

D. Additional Conditions of Probation

In addition to being required to retain a compliance monitor to develop and implement an effective antitrust compliance program, AUO should be required to print advertisements of at least one full page in size in three major trade publications in the United States and three major trade publications in Taiwan containing the information required by U.S.S.G. Section 8D1.4(a). This public acknowledgment of its conviction and punishment and the remedial steps the company has taken as a result of its conviction is necessary because, to date, AUO's public statements have been recalcitrant and have displayed a complete refusal to take responsibility for its criminal conduct.

Also, if the Court permits AUO to pay its criminal fine in installments pursuant to U.S.S.G Section 8C3.2(b), the company should be required to comply with the financial reporting and examination requirements of U.S.S.G. Section 8D1.4(b)(3)-(5).

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VII. CONCLUSION

The government recommends that the Court sentence defendant AUO to pay a $1 billion fine, and defendants H.B. Chen and Hui Hsiung to serve ten years in prison and pay $1 million fines. The government further recommends that AUO and AUOA be placed on probation and, as a condition of probation, be required to implement an antitrust compliance program and hire an independent compliance monitor.

Dated: September 11, 2012

Respectfully submitted,

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U.S. Department of Justice

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON

UNITED STATES OF AMERICA, PLAINTIFF, VS. AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA; HSUAN BIN CHEN, AKA H. B. CHEN; HUI HSIUNG, AKA KUMA, DEFENDANTS.	NO. CR. 09-00110 SI SAN FRANCISCO, CALIFORNIA THURSDAY SEPTEMBER 20, 2012

TRANSCRIPT OF PROCEEDINGS

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ALSO PRESENT: LINH HA, CORPORATE REPRESENTATIVE

PROCEEDINGS; THURSDAY, SEPTEMBER 20, 2012

THE CLERK: CRIMINAL 09-0110, UNITED STATES VERSUS HUI HSIUNG, HSUAN BIN CHEN, AU OPTRONICS CORPORATION AND AU OPTRONICS CORPORATION, AMERICAN.

COUNSEL, PLEASE STATE YOUR APPEARANCES.

MR. OSTERHOUDT: GOOD MORNING, YOUR HONOR. WILLIAM OSTERHOUDT, WITH BRIAN BERSON AND CHRIS HANDMAN, ON BEHALF OF DR. HSUING WHO'S PRESENT.

THE COURT: GOOD MORNING.

MR. ATTANSIO: GOOD MORNING, YOUR HONOR. MIKE ATTANASIO, ALONG WITH JOHN CIESLAK, ON BEHALF OF HSUAN BIN CHEN WHO IS HERE TODAY.

MR. JENKINS: GOOD MORNING, YOUR HONOR. KIRK JENKINS ON BEHALF OF AU OPTRONICS CORPORATION.

THE COURT: GOOD MORNING.

MR. RIORDAN: DENNIS RIORDAN ON BEHALF OF THE CORPORATION AS WELL, AUO AS WELL, YOUR HONOR.

THE COURT: GOOD MORNING.

MS. BOERSCH: GOOD MORNING, YOUR HONOR. MARTHA BOERSCH ON BEHALF OF AUO, THE CORPORATION.

AND I WANTED TO INTRODUCE LINH HA REPRESENTING THE CORPORATION.

THE COURT: GOOD MORNING. SAY THAT NAME AGAIN.

MS. BOERSCH: IT'S LINH HA. FIRST NAME LINH, LINH

LAST NAME HA, H-A.

THE COURT: AND THAT'S AUO AND AUOA OR JUST AUO?

MR. HA: JUST AUO, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

MR. CLINE: GOOD MORNING, YOUR HONOR. JOHN CLINE FOR AUO AMERICA. AND KC MAXWELL IS MY CO-COUNSEL. SHE'S BACK THERE.

THE COURT: DO YOU HAVE A CORPORATE REPRESENTATIVE?

MR. CLINE: I DON'T THINK WE DO. I THINK MR. HA CAN REPRESENT AUOA.

MS. TEWKSBURY: GOOD MORNING, YOUR HONOR. HEATHER TEWKSBURY ON BEHALF OF THE UNITED STATES. I'M HERE WITH PETER HUSTON, JON JACOBS, AND BRENT SNYDER.

THE COURT: GOOD MORNING.

MR. MABIE: AND, YOUR HONOR, CHARLIE MABIE, U.S. PROBATION HERE FOR AARON TAM.

THE COURT: GOOD MORNING. IS THAT EVERYBODY? AND WE HAVE WHATEVER INTERPRETERS WE NEED?

THE INTERPRETER: YES.

THE CLERK: YES.

THE COURT: YOU MAY BE SEATED IF YOU LIKE. WE HAVE A LOT TO TALK ABOUT. I HAVE SOME ISSUES I WANT TO GO OVER. AT THE END I'LL BE HAPPY TO HEAR ANYTHING ANYONE WANTS TO SAY.

AND MS. TEWKSBURY, WOULD YOU PLEASE MAKE SURE THAT I REMEMBER TO ASK THE DEFENDANTS IF THEY WOULD TO ELOCUTE AT THE

END OF THE DAY? OKAY.

THE DEFENDANTS IN COURT THIS MORNING, AU OPTRONICS CORPORATION, WHICH I'LL SOMETIMES CALLED AUO; AU OPTRONICS AMERICA, WHICH I'LL SOMETIMES CALL AUOA; MR. HSUAN B. CHEN, WHO I'LL SOMETIMES CALL H.B. CHEN, IF THAT'S ALL RIGHT; AND MR. HUI HSUING, WHO SOMETIMES IS CALLED KUMA, AND IF THAT'S OKAY, I SOMETIMES WILL CALL HIM KUMA ALSO BECAUSE I CAN PRONOUNCE THAT A LITTLE BETTER, THESE FOUR DEFENDANTS HAVE BEEN CONVICTED OF ONE COUNT OF 15 USC SECTION 1, WHICH IS PRICE FIXING. THEY WERE CONVICTED ON MARCH 13TH OF THIS BASED ON A JURY VERDICT.

I HAVE RECEIVED AND REVIEWED THE FOLLOWING:

FOR EACH DEFENDANT I'VE RECEIVED AND REVIEWED A PRESENTENCE REPORT AND SENTENCING RECOMMENDATION AND ADDENDUM.

FROM THE PLAINTIFF, THE GOVERNMENT, I HAVE RECEIVED A SENTENCING MEMO WITH MANY ATTACHMENTS, INCLUDING DECLARATIONS, AND A REPLY SENTENCING MEMO. AND I HAVE RECEIVED THE GOVERNMENT'S OPPOSITION TO THE DEFENDANT'S MOTION TO STAY SENTENCES PENDING APPEAL.

FROM AUO, I HAVE RECEIVED THE AUO SENTENCING MEMO PART ONE; THE AUO SENTENCING MEMO PART TWO; THE AUO SENTENCING MEMO PART TWO, JENKINS DECLARATION; THE AU SENTENCING MEMO PART THREE; AUO'S RESPONSE TO THE GOVERNMENT'S SENTENCING MEMO CONCERNING THE APPLICATION OF THE GUIDELINES AND CONDITIONAL REQUEST FOR EVIDENTIARY HEARING; AND THE AUO RESPONSE TO THE GOVERNMENT'S SENTENCING MEMO CONCERNING 3553 AND 3572; AND THE

AUO MOTION FOR A STAY PENDING APPEAL AND PAYMENT IN INSTALLMENTS.

FROM AUOA, I'VE RECEIVED THE AUOA SENTENCING MEMO AND THE AUOA MOTION FOR STAY PENDING APPEAL AND PAYMENT IN INSTALLMENTS.

FROM MR. H.B. CHEN I'VE RECEIVED HIS, MR. H.B. CHEN'S SENTENCING MEMO AND MOTION FOR DEPARTURE; MR. CHEN'S OPPOSITION TO THE GOVERNMENT'S SENTENCING MEMO; AND MR. CHEN'S MOTION FOR BAIL PENDING APPEAL.

FROM KUMA, I RECEIVED THE SENTENCING MEMO, MR. KUMA'S SENTENCING MEMO, AND KUMA'S REPLY SENTENCING MEMO, AND HIS MOTION FOR BAIL PENDING APPEAL.

IS THAT EVERYTHING? YES? ALL RIGHT.

SO, MR. HA, YOU'RE SPEAKING HERE AS A REPRESENTATIVE BOTH OF AUO AND AUOA; IS THAT RIGHT, SIR?

MR. HA: YES.

THE COURT: DID YOU HAVE AN OPPORTUNITY TO REVIEW THE PRESENTENCE REPORT THAT WAS PREPARED ABOUT AUO AND AUOA?

MR. HA: YES, I DID, YOUR HONOR.

THE COURT: MR. CHEN, DID YOU HAVE A CHANCE TO REVIEW THE REPORT THAT WAS PREPARED ABOUT YOU?

DEFENDANT CHEN: YES.

THE COURT: AND MR. KUMA, DID YOU HAVE A CHANCE TO REVIEW THE REPORT THAT WAS PREPARED ABOUT YOU?

DEFENDANT HSIUNG: YES.

THE COURT: ALL RIGHT. THANK YOU.

I NOTE, FROM HAVING REVIEWED THE PRESENTENCE REPORTS, THAT THERE WERE CERTAIN UNRESOLVED OBJECTIONS, AND I'M GOING TO GIVE YOU MY VIEW ON THOSE AT THIS TIME AND ON EVERYTHING ELSE. AS I SAY, AT THE END, YOU MAY COMMENT.

I AM PREPARED AT THIS TIME TO OVERRULE ALL OF THE OBJECTIONS THAT WERE LISTED. THAT WAS OBJECTIONS ONE THROUGH SEVEN FOR AUO. THAT WAS OBJECTIONS ONE THROUGH SIX FOR AUOA. THAT WAS ONE THROUGH ELEVEN FOR H.B. CHEN, AND OBJECTIONS ONE THROUGH EIGHT FOR KUMA. THOSE ARE THE OBJECTIONS THAT WERE LISTED AND ARTICULATED IN THE PSR'S THEMSELVES.

I AM PREPARED TO FIND THAT THE VOLUME OF COMMERCE ATTRIBUTABLE TO THE DEFENDANTS MUST BE ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE AS A SENTENCING FACTOR.

THE COURT HAS HAD THE OPPORTUNITY TO HEAR MR. LEFFLER'S TESTIMONY AT TRIAL, AND I'VE REVIEWED THE LEFFLER DECLARATION AND ANALYSIS THAT WAS INCLUDED IN THE SENTENCING MEMORANDUM. I'VE ALSO HAD A CHANCE TO REVIEW DR. HALL'S ANALYSIS, AND I FURTHER DID HEAR FROM MR. DEAL AT TRIAL.

I HAVE RECEIVED CONSIDERABLE BRIEFING ON THE SENTENCING, HUNDREDS OF PAGES, AND IN EVALUATING ALL OF THIS AND -- WELL, THE BRIEFING HAS EVALUATED IT, AND THE BRIEFING HAS ARTICULATED AT SOME LENGTH AND IN CONSIDERABLE DETAIL DEFENDANTS' VARIOUS POSITIONS ON ALL THESE ISSUES.

I AM PREPARED TO FIND THAT THE RECORD IS ADEQUATE TO

SUPPORT THE VOLUME OF COMMERCE AFFECTED TO BE $2,340,000,000, AND I AM PREPARED TO OVERRULE THE REQUEST FOR AN EVIDENTIARY HEARING ON THIS MATTER. I THINK THE RECORD SUFFICIENTLY SUPPORTS THAT FINDING.

THE COURT DISAGREES THE DEFENDANTS' CHALLENGES TO AND ARGUMENTS ABOUT 18 USC 3571, WHICH IS THE ALTERNATIVE FINE STATUTE, AND I AGREE WITH THE GOVERNMENT THAT THE MAXIMUM FINE IN THIS CASE IS ONE BILLION DOLLARS.

THE COURT DISAGREES WITH THE CHALLENGES TO THE PRESENTENCE REPORTS AND THE CHALLENGES TO THE GOVERNMENT'S CALCULATIONS CONCERNING AFFECTED COMMERCE. AND I DISAGREE WITH THE CHALLENGE TO THE 20 PERCENT PROXY ANALYSIS AND THE GUIDELINES.

I AM PREPARED TO FIND THAT THE GUIDELINE ANALYSIS FOR THE INDIVIDUALS THAT'S SET OUT IN THE PSR'S IS CORRECT. I BELIEVE THE FOUR-LEVEL UPWARD ADJUSTMENT FOR ROLE IN THE OFFENSE UNDER 3(B)(1.1)(A) IS APPROPRIATE. THESE INDIVIDUALS WERE ORGANIZERS OR LEADERS OF A CRIMINAL ACTIVITY THAT INVOLVED FIVE OR MORE PARTICIPANTS AND WAS OTHERWISE EXTENSIVE.

AND I ALSO AGREE THERE SHOULD BE NO DOWNWARD ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY.

THE CALCULATION ON THE GUIDELINE ANALYSIS THAT'S SET OUT IN THE PSR'S AND WHICH THE COURT IS PREPARED TO ACCEPT IS AS FOLLOWS:

FOR AUO, THE PSR SUGGESTS THAT THE GUIDELINE RANGE IS

A FINE BETWEEN $936 MILLION AND $1.872 BILLION COMPUTED ON THE GUIDELINE AS FOLLOWS:

TWELVE IS THE BASE OFFENSE LEVEL UNDER 2(R)(1.1)(A). ADD 16 OFFENSE LEVELS FOR THE SPECIFIC OFFENSE IN THAT OVER $1.5 BILLION IN COMMERCE WAS ATTRIBUTABLE TO THE DEFENDANTS, GIVEN THE ESTIMATE OF 2.34 BILLION PANEL SALES THAT AFFECTED U.S. COMMERCE. THAT GIVES YOU TOTAL OFFENSE LEVEL OF 28.

THE BASE FINE IN THE GUIDELINES IS 20 PERCENT OF AFFECTED COMMERCE UNDER 2(R)(1.1)(D)(1). THAT IS $486 MILLION.

THEN THE CULPABILITY SCORE CALCULATED UNDER 8(C)(2.5) IS FIVE FOR THE BASE CULPABILITY SCORE, UP FIVE MORE FOR INVOLVEMENT IN OR TOLERANCE OF CRIMINAL ACTIVITIES WITH OVER 5,000 EMPLOYEES, AND AT LEAST ONE INDIVIDUAL WITH A HIGH LEVEL -- WITH ONE INDIVIDUAL WITHIN HIGH LEVEL PERSONNEL PARTICIPATED IN AND CONDONED THE OFFENSE. THAT'S UNDER 8(C)(2.5)(B)(1)(A)(1).

THAT GIVES YOU A TOTAL CULPABILITY SCORE OF TEN. THIS GIVES YOU MULTIPLIERS BETWEEN 2.0 AND 4.0 BY APPLYING 8(C)(2.6) TO THE CULPABILITY SCORE OF TEN. THIS GIVES YOU A FINE RANGE OF BETWEEN $936 MILLION AND $1.872 BILLION UNDER 8(C)(2.7). THE GUIDELINES PROVIDE FOR PROBATION BETWEEN ONE AND FIVE YEARS AND A MANDATORY SPECIAL ASSESSMENT OF $400.

WITH RESPECT TO AUOA, THE ANALYSIS IS SIMILAR ALTHOUGH SLIGHTLY DIFFERENT. THE FINE THERE IS BETWEEN $842.4 MILLION AND $1.684 BILLION COMPUTED AS FOLLOWS:

THERE'S THE BASE OFFENSE LEVEL OF 12, 16-LEVEL INCREASE FOR THE SPECIFIC OFFENSE, GIVEN THE ESTIMATE OF 2.34 BILLION IN PANEL SALES THAT AFFECTED U.S. COMMERCE. THAT GIVES YOU 28 AS A TOTAL OFFENSE LEVEL. TWENTY PERCENT OF AFFECTED COMMERCE WOULD AGAIN BE 468 MILLION. HOWEVER, THE CULPABILITY SCORE DIFFERS A LITTLE BIT. THERE WOULD BE FIVE AS A BASE CULPABILITY SCORE, UP ONE FOR INVOLVEMENT IN OR TOLERANCE OF CRIMINAL ACTIVITIES.

AUOA IS A SMALLER COMPANY, OVER TEN EMPLOYEES, AND AT LEAST ONE INDIVIDUAL WITH SUBSTANTIAL AUTHORITY PARTICIPATED IN AND CONDONED THE OFFENSE. THAT'S UNDER 8(C)(2.5). THAT'S JUST UP ONE. UP THREE -- AND THIS IS SLIGHTLY DIFFERENT FROM AUO AS WELL.

UP THREE FOR OBSTRUCTION OF JUSTICE, IN THAT THERE WAS THE INSTRUCTION TO DESTROY DOCUMENTS. THAT'S UNDER 8(C)(2.5)(E), AND THAT GIVES YOU A TOTAL CULPABILITY SCORE OF NINE. THEREFORE, THE MULTIPLIERS ARE BETWEEN 1.8 AND 3.6, AND THE FINE RANGE IS BETWEEN 842.4 MILLION AND 1.684 BILLION, WITH A MANDATORY SPECIAL ASSESSMENT OF $400 AND A PROBATION GUIDELINE OF ONE TO FIVE YEARS.

WITH RESPECT TO MR. CHEN, THE SENTENCING RANGE WOULD BE 121 TO 151 MONTHS, BUT BECAUSE 120 MONTHS IS THE MAXIMUM PERMISSIBLE SENTENCE, THAT IS THE GUIDELINE RANGE, 120 MONTHS. YOU GET THERE AS FOLLOWS:

TWELVE IS THE BASE OFFENSE LEVEL UNDER 2(R)(1.1)(A).

YOU ADD 16 FOR THE SPECIFIC OFFENSE GIVEN THE VOLUME OF AFFECTED COMMERCE. YOU ADD FOUR FOR AGGRAVATING ROLE IN THE OFFENSE, AS MR. CHEN WAS A LEADER OR -- ORGANIZER OR LEADER OF AN ACTIVITY INVOLVING MORE THAN FIVE PEOPLE. THIS GIVES YOU A TOTAL OFFENSE LEVEL OF 32, AND I FIND NO OTHER ADJUSTMENTS ARE WARRANTED.

THE CRIMINAL HISTORY IS ONE. THAT'S BECAUSE THERE ARE ZERO POINTS, THERE IS NO CRIMINAL HISTORY. THAT GIVES YOU THE 120-MONTH GUIDELINE RANGE. GUIDELINE FINES IS ONE MILLION DOLLARS. THE SPECIAL ASSESSMENT IS ONE HUNDRED DOLLARS. AND THE PERIOD OF SUPERVISED RELEASE UNDER THE GUIDELINES IS ONE TO THREE YEARS.

WITH RESPECT TO MR. HUI HSUING, MR. KUMA, THE SENTENCING RANGE IS THE SAME, EXACTLY THE SAME AS FOR MR. CHEN, AND, THEREFORE, YOU GET -- AND THE CRIMINAL HISTORY IS ZERO POINTS, EXACTLY THE SAME. AND SO THE GUIDELINE RANGE IS 120 MONTHS. GUIDELINE FINE IS $1 MILLION. SPECIAL ASSESSMENT IS ONE HUNDRED DOLLARS. AND THE SUPERVISED RELEASE IS ONE TO FIVE YEARS.

HAVE I GOT THAT WRONG?

THE CLERK: YOU SAID ONE TO THREE ON...

THE COURT: I'M SORRY. ONE TO THREE YEARS.

NOW, WITH RESPECT TO THE CORPORATE DEFENDANT AUO, THE PROBATION OFFICER HAS RECOMMENDED A $500 MILLION FINE, THREE YEARS OF PROBATION CONDITIONED ON ADOPTING AND IMPLEMENTING AN

ANTITRUST COMPLIANCE PROGRAM, AND CONDITIONED ON FORMAL AND PUBLIC ACKNOWLEDGMENT OF THE OFFENSE, AND A $400 ASSESSMENT.

THE GOVERNMENT IN ITS PAPERS HAS REQUESTED A ONE BILLION DOLLAR FINE, HAS REQUESTED PROBATION CONDITIONED ON AN ANTITRUST COMPLIANCE PROGRAM AND THAT AN INDEPENDENT MONITOR BE HIRED.

THE DEFENDANT ARGUES THAT IT SHOULD PAY NO GREATER THAN EITHER $100 MILLION OR NO GREATER THAN $285 MILLION BY WAY OF FINE.

FOR AUOA, THE PROBATION OFFICER HAS RECOMMENDED NO FINE, A THREE-YEAR PERIOD OF PROBATION CONDITIONED ON ADOPTING AND IMPLEMENTING AN ANTITRUST COMPLIANCE PROGRAM AND A $400 SPECIAL ASSESSMENT.

GOVERNMENT HAS REQUESTED NO FINE AND PROBATION CONDITIONED ON AN ANTITRUST COMPLIANCE PROGRAM AND HIRING OF AN INDEPENDENT MONITOR, AND THE DEFENDANT REQUESTS NO FINE.

MR. CHEN -- AS TO MR. CHEN, THE PROBATION OFFICER HAS RECOMMENDED A 120-MONTH PRISON SENTENCE, A $500,000 MILLION -- A $500,000 FINE, A $100 DOLLAR SPECIAL ASSESSMENT, AND THREE YEARS OF SUPERVISED RELEASE.

THE GOVERNMENT HAS REQUESTED A 120-MONTH IN PRISON AND A ONE MILLION DOLLAR FINE.

THE DEFENDANT HAS REQUESTED A LOT LESS THAN THAT, MAYBE SEVEN MONTHS, BUT A LOT LESS, AND A SMALLER FINE AND NO SUPERVISED RELEASE.

OKAY. STRIKE WHAT I JUST SAID ABOUT WHAT THE DEFENDANT HAS REQUESTED.

MR. CHEN HAS REQUESTED A DOWNWARD DEPARTURE, SAYS HE'S NOT IN THE HEARTLAND, AND HE WANTS A LOT LESS AND A SMALLER FINE.

AS TO MR. KUMA, THE PROBATION OFFICER HAS RECOMMENDED 120 MONTHS IN PRISON, A $500,000 FINE, A ONE HUNDRED DOLLAR SPECIAL ASSESSMENT, THREE YEARS OF SUPERVISED RELEASE.

THE GOVERNMENT HAS REQUESTED 120 MONTHS IN PRISON AND A ONE MILLION DOLLAR FINE. AND MR. KUMA'S LAWYERS HAVE REQUESTED A LOT LESS, MAYBE SEVEN MONTHS, MAYBE LESS, A SMALLER FINE AND NO SUPERVISED RELEASE.

THIS WAS A SERIOUS AND A FAR-REACHING CONSPIRACY. IT'S THE COURT'S FINDING THAT IT WAS PROVED BEYOND PERADVENTURE AT TRIAL THAT THIS CONSPIRACY EXISTED AND WAS AFFECTED AND CAUSED EXACTLY THE DAMAGES SET OUT.

THE COURT FULLY AGREES WITH THE JURY'S VERDICT BASED ON THE OVERWHELMING EVIDENCE AT TRIAL.

THE COURT ALSO AGREES THAT THE FINANCIAL CONSEQUENCES TO THE U.S. MARKET WERE ENORMOUS.

THE COURT RECOGNIZES THAT OTHER DEFENDANTS ADMITTED THEIR CONDUCT AND GOT OUT EARLY, AND SOME COOPERATED. THE AUO DEFENDANTS DID NOT DO THAT. BUT THE TRIAL MADE IT CRYSTAL CLEAR THAT THEY ARE GUILTY.

AS TO THE CORPORATIONS ON THE SENTENCE, IT'S

DIFFICULT TO KNOW EXACTLY THE SENTENCE HERE. THE COURT AGREES WITH THE PROBATION OFFICER THAT ANY FINE AS TO AUOA WOULD EFFECTIVELY BE PILING ON, SO I'M NOT GOING TO IMPOSE A FINE ON AUOA.

AS TO AUO, THE GOVERNMENT HAS REQUESTED A ONE BILLION DOLLAR FINE TO UNDERSCORE THE SERIOUSNESS OF THE MATTER. THE PROBATION OFFICER HAD RECOMMENDED A $500 MILLION FINE FOR THE SAME REASON. AND THE COURT IS PREPARED TO SENTENCE IN ACCORDANCE WITH THE RECOMMENDATION OF THE PROBATION OFFICER.

I FIND THAT HERE THE FINANCIAL RAMIFICATIONS TO THESE DEFENDANTS HAVE ALREADY BEEN MASSIVE, AND THEY ARE NOT OVER YET. THERE'S STILL A LOT OF CIVIL SUITS OUT THERE. THE DIRECT PURCHASER PLAINTIFF CLASSES, THE INDIRECT PURCHASERS PLAINTIFF CLASSES HAVE BEEN PAID LARGE AMOUNTS. OTHER ACTIONS ARE STILL IN PROGRESS AND WILL LIKELY RESULT IN FURTHER PAYMENTS.

THE COURT AGREES WITH THE PROBATION OFFICER THAT NO SEPARATE RESTITUTION SHOULD BE AWARDED SINCE THE CIVIL ACTIONS ARE EFFECTIVELY MAKING PAYMENTS TO THE VICTIMS.

THE COURT PREFERS THAT AUO PAY THE VICTIMS NOT -- AS OPPOSED TO FINES. SO I AM PREPARED TO FIND THAT A $500 MILLION FINE IS ENOUGH, BUT NOT EXCESSIVE.

I DO WANT TO SAY THIS: AUO AND AUOA AND THE INDIVIDUAL DEFENDANTS HERE HAVE PRODUCED AN EXTREMELY USEFUL PRODUCT, AND IT REALLY HAS CHANGED THE WORLD; HOW WE LIVE, AND HOW WE FUNCTION, AND HOW WE PROCESS INFORMATION, AND HOW WE

LIVE OUR LIVES, AND HOW WE CONDUCT OUR GOVERNMENT. SO, I DON'T MEAN IN ANY WAY TO DENIGRATE THE IMPORTANCE OF THE PRODUCTS THESE DEFENDANTS HAVE SUPPLIED TO THE WORLD. THEY ARE VERY IMPORTANT, AND I THINK THAT WE NEED TO ASSURE THAT BUSINESSES PRODUCING USEFUL PRODUCTS WITH SERVICES TO PROVIDE TO THE COMMUNITY AND THE WORLD NOT BE PENALIZED TO THE POINT WHERE THEY ARE NO LONGER ABLE TO DO THAT.

SO I THINK THE ONE BILLION DOLLAR FINE REQUESTED BY THE GOVERNMENT, ALTHOUGH DRAMATIC, IS SIMPLY SUBSTANTIALLY EXCESSIVE TO THE NEEDS OF THIS MATTER.

I FIND THAT -- I BELIEVE THAT THE FINES THAT HAVE ALREADY BEEN IMPOSED, THE FINES THAT AUO WILL BE PAYING, THE MONEY THAT'S BEEN PAID OVER TO THE VARIOUS VICTIMS IN THESE CASES, PLUS THE TRIAL, PLUS THE ENORMOUS COSTS IN MONEY AND IN TIME AND IN EMOTION OF THESE TRIALS HAS -- CERTAINLY HAD GOTTEN THE ATTENTION OF THE DEFENDANTS IN THIS CASE, AND THAT'S WHY I FIND THAT $500 MILLION IS ADEQUATE BUT NOT EXCESSIVE.

I WANT TO SAY SOMETHING ELSE BOTH ABOUT THE CORPORATIONS AND ABOUT THE INDIVIDUALS. I WILL GET TO THE INDIVIDUALS IN A MINUTE. BUT VERY OFTEN WHEN ONE COMES TO TIME OF SENTENCING AND DEFENDANTS ARE ASKED IF THERE'S ANYTHING THEY WOULD LIKE TO SAY, THEY VERY OFTEN SAY: OH, I RECOGNIZE THAT I MADE POOR CHOICES IN THIS CASE, AND THAT MY JUDGMENT WAS POOR, AND I APOLOGIZE FOR MY POOR JUDGMENT AND MY BAD CHOICES.

MY RESPONSE TO THAT IS VERY OFTEN THAT YOU MADE FAR

MORE THAN BAD CHOICES IN THIS CASE, YOU COMMITTED FELONIES, AND LET'S GET ON WITH IT. IN THIS CASE, THOUGH, I THINK THAT THOSE EXPLANATIONS ACTUALLY ARE QUITE APT.

THERE WAS ENORMOUSLY BAD JUDGMENT EXERCISED BY THIS CORPORATION, THESE DEFENDANTS, AND THE OTHER CORPORATIONS ENGAGED IN THIS CONDUCT, AND THEY MADE POOR CHOICES, AND THEY'RE BEING -- BECAUSE THOSE INVOLVED CRIMINAL CHOICES, THEY ARE BEING PUNISHED FOR THOSE CRIMES. THAT'S REALLY WHAT WAS HAPPENING IN THIS INSTANCE, AND SO I THINK THESE PUNISHMENTS ARE APPROPRIATE FOR THAT.

AS TO MR. CHEN, HE WAS THE PRESIDENT AND THE CHIEF OPERATING OFFICER OF AUO. HE'S 60 YEARS OLD. HE HAS NO CRIMINAL RECORD. HE'S A WELL-RESPECTED CITIZEN OF TAIWAN. HE'S INTELLIGENT. HE HAS A STRONG WORK ETHIC. HE'S AN INDUSTRY LEADER. HE HAS STRONG FAMILY RELATIONSHIPS. HE'S WEALTHY. HE IS GENEROUS WITH HIS PERSONAL WEALTH.

THE GUIDELINES REQUIRE AND THE 3553(A) FACTORS REQUIRES THAT THEIR SENTENCE BE SUFFICIENT BUT NOT GREATER THAN NECESSARY TO PUNISH THIS CRIME AND TO FULFILL THE OBJECT OF THE SENTENCING STATUTES.

IT WAS A SERIOUS CRIME, BUT THE BUSINESS LOGIC OF ASSISTING A FLEDGLING INDUSTRY IN ANOTHER COUNTRY AND IN ANOTHER CULTURE AND ACTING IN AND FOR THE BENEFIT OF HIS COMPANY AND OTHERS IN THE INDUSTRY ARE OFFSETTING FEATURES OF THIS CRIME. THEY DON'T MAKE IT NOT A CRIME. THEY DON'T EXCUSE

IT, BUT THEY GO A LONG WAY TO EXPLAIN IT.

THE CAREFUL NOTES IN THE AGENDAS THAT WERE PREPARED IN THIS CASE NOT ONLY MADE THE EVIDENCE IN THE CASE OVERWHELMING, BUT THEY ALSO CONVINCED ME THAT FOR A CONSIDERABLE PERIOD OF TIME THE DEFENDANTS THOUGHT THEY WERE DOING THE RIGHT THING VIS-A-VIS THEIR INDUSTRY AND THEIR COMPANIES. THEY WEREN'T, BUT THAT'S WHAT THEY THOUGHT AT THE TIME.

I DON'T MEAN TO SUGGEST THEY DIDN'T KNOW IT WAS ILLEGAL. I THINK THEY DID KNOW IT WAS ILLEGAL. BUT THERE WERE A LOT OF BUSINESS PRESSURES THAT THEY WERE RESPONDING TO, AND THAT'S WHAT THEY DID.

THESE WERE POOR CHOICES. IT WAS BAD JUDGMENT. BUT THERE WAS NO -- THERE WAS RELATIVELY LITTLE PERSONAL MOTIVATION.

I CONTRAST THE CASE BEFORE ME WITH, FOR EXAMPLE, SOME OF THE MAIL FRAUD AND WIRE FRAUD AND OTHER KINDS OF FRAUD CASES WHICH WE SEE THAT INVOLVE PERHAPS SMALLER DOLLAR AMOUNTS BUT ACTORS WHO TOOK MONEY SO THEY COULD KEEP IT AND SPEND IT. THAT WASN'T REALLY WHAT HAPPENED HERE. THERE CERTAINLY WERE BENEFITS FLOWING TO THESE DEFENDANTS FROM WHAT THEY DID, BUT IT WAS A DIFFERENT KIND OF CRIME FROM THOSE PERSONAL FRAUD CRIMES.

THE OTHER DEFENDANTS IN THIS CASE WERE SENTENCED TO PRISON FOR PERIODS OF BETWEEN SIX MONTHS AND FOURTEEN MONTHS. THOSE INDIVIDUALS WERE IN VERY DIFFERENT CIRCUMSTANCES,

HOWEVER, FROM MR. CHEN.

BASED ON ALL OF THESE CIRCUMSTANCE, I FIND IT IS APPROPRIATE TO IMPOSE A SENTENCE OF 36 MONTHS IN PRISON ON MR. CHEN.

AS TO A FINE, MY PRELIMINARY VIEW IS $200,000 IS AN APPROPRIATE FINE FOR MR. CHEN.

AS TO MR. KUMA, HE WAS THE EXECUTIVE VICE PRESIDENT OF SALES OF AUO. HE'S 58 YEARS OLD. HE HAS NO CRIMINAL RECORD. HE IS A WELL-RESPECTED CITIZEN OF TAIWAN. HE'S INTELLIGENT, HAS A STRONG WORK ETHIC. HE'S AN INDUSTRY LEADER. STRONG FAMILY RELATIONSHIPS. HIS PARENTS FLED CHINA FOR TAIWAN DURING CIVIL UNREST IN CHINA. HIS FAMILY IS SUPPORTIVE, ESPECIALLY HIS MOTHER, WHO HAS TAKEN THE LABORING OAR IN BRINGING HIM UP. AGAIN, HIS SENTENCE MUST BE SUFFICIENT, BUT NOT GREATER THAN NECESSARY.

THIS IS A SERIOUS CRIME, BUT THE THINGS I SUGGESTED ABOUT MR. CHEN APPLY ALSO TO MR. KUMA, BUT THE CIRCUMSTANCES OF THIS CASE WERE DIFFERENT FROM MANY OF THE CRIME -- THE FRAUD TYPE CRIMES THAT WE SEE IN THIS COURT.

SO, AGAIN, I FIND THAT THERE WERE REASONS FOR COMMITTING THESE ACTS. I THINK THE DEFENDANT KNEW THEY WERE WRONG AND KNEW THEY WERE ILLEGAL, BUT THERE WERE REASONS THAT THEY -- THAT THEY HAD THAT MAKES THIS A DIFFERENT CIRCUMSTANCE FROM MANY OTHERS THAT I FACE.

SO, AGAIN, I FIND THAT A SENTENCE OF 36 MONTHS IS THE

APPROPRIATE SENTENCE HERE.

SO THOSE ARE MY PRELIMINARY VIEWS, AND I'LL BE HAPPY TO HEAR FROM COUNSEL.

MR. RIORDAN: YOUR HONOR, COULD WE HAVE A MOMENT WITH COUNSEL?

THE COURT: YES, YOU MAY.

(PAUSE IN PROCEEDINGS.)

MR. RIORDAN: YOUR HONOR, IN TERMS OF THE SENTENCE THE COURT HAS ANNOUNCED, WE WILL STAND ON OUR BRIEFING. WE WOULD RESERVE THE RIGHT TO MAKE A RESPONSE IF THE GOVERNMENT ADDRESSES THE COURT. AND OTHER THAN THAT, WE'D WAIT UNTIL THE ISSUE OF -- TO DISCUSS THE STAY ISSUE AND SO FORTH IN TERMS OF PAYMENT.

THANK YOU, YOUR HONOR.

MR. HUSTON: BEFORE MS. TEWKSBURY SPEAKS, YOU DIDN'T, I DON'T THINK, MENTION A FINE WITH RESPECT TO KUMA. I DON'T KNOW IF IT WAS AN OVERSIGHT.

THE COURT: IT WAS AN OVERSIGHT. THANK YOU. IT WAS. THAT WOULD BE $200,000. THANK YOU, MR. HOUSTON.

MS. TEWKSBURY: YOUR HONOR, IF I MAY ADDRESS THE COURT'S DETERMINATION THAT A BILLION DOLLARS IS SUBSTANTIALLY EXCESSIVE TO THE NEEDS OF THIS MATTER?

THE UNITED STATES CONTINUES TO RECOMMEND THE COURT IMPOSE THE MAXIMUM FINE AVAILABLE TO IT UNDER SECTION 3571(D) AND THE SENTENCING GUIDELINES. MAXIMUM SENTENCES SHOULD BE

RESERVED FOR THE WORST OFFENDERS, AND THESE DEFENDANTS MEET THAT DESCRIPTION BASED ON A COMBINATION OF FACTORS NEVER BEFORE SEEN IN A SINGLE CASE IN FRONT OF THE ANTITRUST DIVISION.

FIRST, THESE DEFENDANTS PLAYED PIVOTAL ROLES IN A GLOBAL CONSPIRACY THAT HAD AN UNPRECEDENTED IMPACT ON THE POCKETBOOKS OF COUNTLESS AMERICAN CONSUMERS. NEVER BEFORE HAS THE ANTITRUST DIVISION SEEN A CONSPIRACY SO PERVASIVE AND AFFECTING A PRODUCT IN DEMAND WITHIN SO MANY U.S. HOMES AND BUSINESSES.

SECOND, DEFENDANTS H.B. CHEN AND DR. HSUING WERE AUO'S MOST SENIOR EXECUTIVES, AND AUO BEGAN PARTICIPATING IN THIS CONSPIRACY FROM ITS VERY INCEPTION UNTIL THE DAY THE FBI RAIDED ITS OFFICES.

RARELY DOES THE ANTITRUST DIVISION SEE A CONSPIRACY REACH SO HIGH WITHIN AN ORGANIZATION, THAT EVEN THE COMPANY'S PRESIDENT AND EXECUTIVE VICE PRESIDENT ARE LEADING ITS CHARGE.

WHILE IT'S TRUE THAT THESE TWO FACTORS, THE MASSIVE HARM CAUSED TO U.S. CONSUMERS BY THIS CONSPIRACY AND THE PARTICIPATION OF TOP EXECUTIVES DESCRIBE ALL THE COMPANIES INVOLVED IN IT, THESE PARTICULAR DEFENDANTS AUO, AUO AMERICA, H.B. CHEN AND DR. HSUING, ARE SET APART FOR SENTENCING PURPOSES BY THEIR UTTER LACK OF ACCEPTANCE OF RESPONSIBILITY.

THEY REFUSED TO ACCEPT RESPONSIBILITY AND INSTEAD TOOK A GAMBLE, WHICH WAS TOTALLY WITHIN THEIR RIGHTS TO DO, BUT THEY LOST, REALLY LEAVING THIS COURT AND THE GOVERNMENT WITH NO

JUSTIFIABLE BASIS TO DEPART.

WHILE IT'S ALSO TRUE THAT COURTS AROUND THE COUNTRY HAVE SENTENCED MEMBERS OF INTERNATIONAL CARTELS THAT CAUSE MASSIVE HARM AND EVEN EXECUTIVES THAT ARE IN HIGH-LEVEL POSITIONS, THERE IS NO PRECEDENT FOR THE COMBINATION OF THESE FACTORS THAT MATCH THIS CARTEL OR THESE DEFENDANTS.

PERHAPS THE CLOSEST CASE THAT WE'VE SEEN IS ADM AND ITS TOP EXECUTIVES IN THE MID '90'S. ADM, HOWEVER, PLED GUILTY TO FIXING PRICES OF LYSINE AND CITRIC ACID. AT THE TIME THESE CARTELS WERE CONSIDERED THE MOST SERIOUS THE DIVISION HAD EVER PROSECUTED. AND THE SENTENCING COURT UNDER 3571(D) AND PURSUANT TO A PLEA AGREEMENT SENTENCED ADM TO A HUNDRED MILLION, TEN TIMES THE THEN STATUTORY MAX OF TEN MILLION. THIS WAS WITHOUT THE BENEFIT OF A DETERMINATION OF OVERCHARGE BY A JURY, AND THIS IS THE ONLY CASE WHERE SUCH A VERDICT HAS EVER BEEN REQUESTED.

NOW, A HUNDRED MILLION AT THE TIME WAS RECORD SETTING, AND IN THE YEARS THAT FOLLOWED, THE ANTITRUST DIVISION SECURED FINES THAT WERE UP TO FIVE TIMES THE ADM FINE, INCLUDING A FINE AGAINST VITAMINS PRODUCER HOFFMAN-LA ROCHE, WHICH WAS FINED $500 MILLION 13 YEARS AGO, AND THAT WAS AFTER IT ACCEPTED RESPONSIBILITY, PLEAD GUILTY, AND AS SECOND IN COOPERATOR SUBSTANTIALLY ASSISTED THE GOVERNMENT IN ITS PROSECUTION OF NUMEROUS COMPANIES AND INDIVIDUALS.

THESE RECORD FINES DID RECEIVE WIDESPREAD PUBLICITY

THAT REACHED ALL THE WAY TO ASIA, YET IT DIDN'T DETER THIS CARTEL. IN FACT, JUST TWO YEARS LATER, AUO AND ITS COCONSPIRATORS WERE MEETING SECRETLY IN A HOTEL ROOM AND HATCHING A PLAN TO FIX PRICES THAT EXTENDED FIVE YEARS.

$500 MILLION IS NOT ENOUGH TO DETER CARTELS LIKE THIS FROM FORMING.

ADM PLED GUILTY AND RECEIVED A RECORD-SETTING FINE, BUT ITS EXECUTIVES, LIKE THE EXECUTIVES HERE, DECIDED TO EXERCISE THEIR RIGHT AND TAKE THE GOVERNMENT TO TRIAL. THEY TOOK A GAMBLE AND THEY LOST, AND THEIR GUIDELINE SENTENCE RANGE REFLECTED THEIR LACK OF ACCEPTANCE OF RESPONSIBILITY, AND THEY WERE AT THE STATUTORY MAX AS WELL.

THE ANTITRUST DIVISION ASKED THE COURT TO IMPOSE THE STATUTORY MAX, WHICH AT THAT TIME WAS THREE YEARS, JUST WHAT THE COURT IS RECOMMENDING FOR THESE DEFENDANTS.

THE COURT SENTENCED THE EXECUTIVE VICE PRESIDENT TO THE STATUTORY MAX, AND HIS RIGHT-HAND MAN, SHE SENTENCED HIM TO THREE MONTHS SHY OF IT.

THE COOPERATING WITNESSES WHO TESTIFIED AGAINST THOSE EXECUTIVES BACK THEN IN THE ADM CASE WERE ALSO TESTIFYING PURSUANT TO PLEA AGREEMENTS, BUT THEY RECEIVED NO JAIL TIME, NONE AT ALL.

DESPITE HAVING KNOWN THIS FROM THE OUTSET, HAVING KNOWN THEY FACED A BILLION DOLLAR FINE AND SIGNIFICANT JAIL TERMS, THE DEFENDANTS NOW COMPLAIN THAT THEY WERE SOMEHOW BEING

PUNISHED FOR HAVING EXERCISED THEIR RIGHT TO GO TO TRIAL AND PUT THE GOVERNMENT TO ITS PROOF.

THEY ROLLED THE DICE, AND HAD THEY BEEN RIGHT AND THE GOVERNMENT COULD NOT PROVE OVERCHARGES SUFFICIENT TO YIELD A BILLION DOLLAR FINE, THEN THEY WOULD HAVE THE BENEFIT OF THAT GAMBLE. BUT HAVING LOST, THEY ARE STUCK WITH THE CONSEQUENCES, YET THEY NOW COMPLAIN THAT THESE CONSEQUENCES, WHICH THEY HAVE ALWAYS KNOWN, NOW SOMEHOW THESE KNOWN AND CALCULATED RISKS ARE CONSIDERED DRACONIAN BY THEM.

IF THE DEFENDANTS DO CHOOSE TO ADDRESS A COUPLE OF ISSUES, I WOULD LIKE TO FRONT THEM HERE, ALTHOUGH THE COURT HAS, WE BELIEVE, MADE THE RIGHT DETERMINATION ON THEM.

IT'S NOT THE GOVERNMENT WHO IS ASKING THE COURT TO DO ANYTHING UNPRECEDENTED HERE. THE GOVERNMENT ONLY ASKED COURT TO APPLY 3571(D), JUST AS IT DID WITH LG AND CMO IN THIS CASE. THE GOVERNMENT ASKED THE COURT TO ONLY APPLY THE GUIDELINES AS IT'S DONE AND AS IT HAS DONE BEFORE BY USING THE 20 PERCENT PROXY 2(R)(1.1).

AND AS THE GOVERNMENT HAS -- AS THE COURT HAS DONE IN CONNECTION WITH SEVEN SENTENCINGS IN THIS CASE ALONE, IN NINE SENTENCINGS IN PAST ANTITRUST CASES YOU'VE HANDLED, AND JUST LIKE EVERY OTHER COURT ACROSS THE COUNTRY HAS DONE IN USING ANTITRUST GUIDELINES, THE GOVERNMENT IS ASKING THE COURT TO APPLY THE DEFINITION OF VOLUME OF COMMERCE AS IT ALWAYS HAS, WHICH THE COURT CAN DO.

THE COURT: SO FAR YOU ARE WINNING THOSE POINTS, YOU KNOW?

MS. TEWKSBURY: YES, THANK YOU.

BUT WHAT THE DEFENDANTS ARE ASKING YOU TO DO IS TREAT THEM MORE FAVORABLY AT SENTENCING FOR HAVING GONE TO TRIAL AND LOST THAN THOSE WHO ACCEPTED RESPONSIBILITY YEARS AGO, AND I'D USE LG AS AN EXAMPLE. LG CAME IN SIX YEARS AGO. THEY STARTED COOPERATING SIX MONTHS BEFORE THE GOVERNMENT EVER BROUGHT THIS CASE, EVER ISSUED SUBPOENAS.

THEY PROVIDED SUBSTANTIAL ASSISTANCE TO THE GOVERNMENT BY HELPING IT DEVELOP ITS CASE, OBTAIN GUILTY PLEAS FROM NEARLY EVERYONE, AND PROSECUTE THESE DEFENDANTS. YET LG WAS REQUIRED TO PAY $400 MILLION FINE, AND ITS EXECUTIVES WENT TO JAIL.

AFTER DOING ALL OF THIS, LG GOT A 50 PERCENT DISCOUNT, EXACTLY WHAT THE FINE THAT THE COURT IS NOW STATING AUO WOULD GET. BUT AUO IS GETTING A 50 PERCENT DISCOUNT WITHOUT EVER PROVIDING A SHRED OF COOPERATION. THAT WOULD TRULY BE AN INEQUITABLE RESULT HERE, YOUR HONOR.

THE THEN RECORD-SETTING SENTENCES IN THE ADM CASE REFLECTING THE FACT THAT IT REPRESENTED THE MOST EGREGIOUS ANTITRUST CASE OF ITS TIME, BUT THIS CASE IS WORSE.

THE LCD CONSPIRACY LASTED LONGER AND IT IMPACTED AMERICAN CONSUMERS AT LEAST FIVE TIMES GREATER, BUT THE BIG DIFFERENCE BETWEEN ADM AND AUO IS THAT ADM ACCEPTED

RESPONSIBILITY FOR ITS CRIME, SOMETHING THAT AUO TO THIS DAY REFUSES TO DO.

YOUR HONOR, WE BELIEVE THE $500 MILLION FINE IS JUST COMPLETELY UNABLE TO DETER THE SORT OF CONDUCT WE ARE SEEING HERE.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

MR. RIORDAN: YOUR HONOR, IN REJECTING BOTH OUR POSITION ON SENTENCING AND THE GOVERNMENT'S, THE COURT OBVIOUSLY DISPLAYED THAT IT HAD THOUGHT THROUGH THIS MATTER VERY, VERY CAREFULLY. AND, AGAIN, WE SIT ON OUR -- STAND ON OUR BRIEFING AND THE COURT'S EARLIER COMMENTS IN ANNOUNCING ITS TENTATIVE DECISION.

THE COURT: THANK YOU.

MR. OSTERHOUDT: YOUR HONOR, I THINK THAT GOVERNMENT HAS REALLY -- IN SPITE OF THEIR STATEMENT TO THE CONTRARY, REALLY HAS RECOMMENDED PUNISHMENT OF THE DEFENDANTS FOR GOING TO TRIAL IN THIS CASE.

I SAY THAT RESPECTFULLY BECAUSE I KNOW THAT CIRCUMSTANCES WERE DIFFERENT TWO YEARS AGO WHEN OTHER PEOPLE WERE SENTENCED, BUT WHAT'S CHANGED REALLY IS THAT THIS CASE WAS TAKEN TO TRIAL -- I WANT TO RESPECTFULLY DISAGREE WITH THE SUGGESTION THAT DR. HSUING HAS NOT COOPERATED IN ANY WAY. HE CAME VOLUNTARILY TO THE COUNTRY -- HE HAD NO ASSURANCES HE WOULD EVEN GET BAIL -- TO STAND TRIAL. HE KEPT FAITH WITH THE

COURT THROUGHOUT THE CASE.

BY THE WAY, HE WAS NOT EXECUTIVE VICE PRESIDENT UNTIL FIVE MEETINGS HAD ALREADY OCCURRED. HE DIDN'T GO TO THE FIRST THREE. HE ONLY WENT TO ONE AFTER SALES AND TWO.

I DON'T SAY THAT TO ARGUE WITH YOUR HONOR'S SENTENCE. I KNOW YOU THOUGHT IT OUT VERY CAREFULLY.

MR. BERSON AND I AND MR. HANDMAN NEVER MET A CLIENT THAT WE HAVE SO MUCH ADMIRATION AND RESPECT FOR AS DR. HSUING, AND IT SHINES THROUGH THESE LETTERS.

I THINK I WOULD BE REMISS IN MY DUTY TO HIM IF I DIDN'T SAY ON HIS BEHALF THAT I DO THINK HIS SENTENCE WOULD BE FAIR AND WOULD ACHIEVE THE PURPOSES. IT WOULDN'T BE EXCESSIVE, BUT IT WOULD BE SUFFICIENT TO SATISFY THE PURPOSE OF THE SENTENCING IF IT WERE LESS THAN 36 MONTHS.

I KNOW YOU THOUGHT THIS CAREFULLY OUT, BUT, YOU KNOW, WHEN WE LOOK AT C.C. LIU, BOCK KWON, AND FRANK LIN AND OTHERS WHO ACTUALLY PARTICIPATED -- IN MR. LIN'S CASE IN DESTRUCTION OF DOCUMENTS BEFORE COMING IN TO COOPERATE. AND SAMSUNG, WHO IS CLIENT EASTWOOD'S EMPTY CHAIR IN THIS CASE, WHO COMPLETELY GOT A PASS HERE FOR SELF REPORTING, HAVING COMMITTED CRIMES IN THE PAST LIKE THIS.

I DO THINK THAT THE GOVERNMENT'S CONDEMNATION IS EXCESSIVE, AND I DO URGE THAT YOU GIVE THOUGHT TO SOME OF THE THINGS THAT HAVE BEEN SAID IN THE LETTERS THAT ARE ADDRESSED TO YOU AND THAT YOU CONSIDER A LESSER SENTENCE IN HIS CASE THAN

THE ONE -- I'M NOT SAYING YOURS IS UNFAIR, GARGANTUAN, OR WRONG, ONLY THAT I THINK HE MERITS THAT CONSIDERATION BECAUSE OF THE WAY HE'S LIVED HIS LIFE AND WHAT HE'S MEANT TO THE ECONOMY IN TAIWAN, WHAT HE'S MEANT TO THIS INDUSTRY THAT HE HELPED TO PROMOTE. HE'S A BRILLIANT SCIENTIST, FIRST OF ALL. HE WROTE HIS PH.D. THESIS ABOUT LCD AT BERKELEY. HE LOVES THE TECHNOLOGY. HE WANTS TO SPREAD IT AS WIDE AS POSSIBLE.

WHEN THIS IS OVER, I KNOW I WANT HIM TO BE ABLE TO CONTINUE TO DO THAT. THERE'S GREAT CONTRIBUTIONS HE STILL HAS TO MAKE.

AND I JUST WANTED TO SAY THOSE THING TO YOUR HONOR SO YOU WOULD HAVE THOSE IN MIND.

THE COURT: THANK YOU.

MR. ATTANSIO: LIKE MR. OSTERHOUDT, I'LL BE VERY BRIEF, AND I VERY MUCH APPRECIATE HOW OBVIOUS IT IS THAT THE COURT HAS PUT A LOT OF THOUGHT INTO THIS.

THIS IS THE TYPE OF SENTENCING WHERE ONE AS A LAWYER SAYS, THANK GOODNESS FOR BOOKER, BECAUSE INSTEAD OF HAVING TO APPLY THE GUIDELINES RIGIDLY, WE HAVE THE DISCRETION THAT YOUR HONOR CAN APPLY TO A CASE LIKE THIS UNDER THE SENTENCING FACTORS. AND ON BEHALF OF MR. CHEN, WE VERY MUCH APPRECIATE IT.

LET ME SPEAK VERY BRIEFLY, THOUGH, AS THE LETTERS SHOW, ON MR. CHEN'S BEHALF ABOUT THIS MAN, WHAT HE'S DONE AS FAMILY MAN, AS A BUSINESS LEADER, AND AS A COMMUNITY LEADER. I

KNOW YOUR HONOR REFERENCED THAT AND HAS READ THE LETTERS.

I WANT TO POINT OUT JUST ONE THING, SIMPLY BECAUSE I HEARD YOUR HONOR REFERENCE IT IN OTHER SENTENCINGS THAT I'VE ATTENDED IN THIS COURT.

MR. CHEN DID THOSE THINGS THAT WE SEE IN THOSE LETTERS ANONYMOUSLY, AND ONE OF THE LETTERS IS EXEMPLARY OF THIS. IT'S THE BLUE SKY HOME, A CATHOLIC-CHURCH-SPONSORED CHARITY FOR JUVENILE DELINQUENTS IN TAIWAIN. THE EXECUTIVE DIRECTOR IN THE LETTER SAYS:

> "FROM 2003 UNTIL NOW, MR. CHEN, TOGETHER WITH HIS FAMILY, HAVE CONTINUALLY DONATED TO HELP OUR YOUTHS FOR UP TO 15 TIMES. AS BELIEVERS OF THE TRADITIONAL VALUE OF PEOPLE GO OUT OF THEIR WAY NOT TO BE KNOWN, THEY NEVER ASK US FOR ANY CERTIFICATE OF APPRECIATION. I AM CONVINCED THEY ARE DOING IT OUT OF THEIR IDENTITY WITH OUR MISSION, AND ITS FAR-REACHING INFLUENCE ON TAIWANESE SOCIETY."

I WANTED TO FRAME THAT WITH ONE ADDITIONAL STEP. IT'S BEEN DONE BECAUSE IT'S THE RIGHT THING TO DO, NEVER KNOWING WE'D BE HERE TODAY.

MR. CHEN CAME HERE FROM A COUNTRY WITH NO EXTRADITION TREATY. THERE WAS QUITE A BIT OF DISCUSSION ABOUT THAT WHEN HE FIRST CAME HERE. HE'S HONORED THE CONDITIONS OF RELEASE. HE

HAS ASKED ME PERSONALLY FOR HIM TO CONVEY TO THE COURT AND TO THE GOVERNMENT HIS GREAT THANKS AND GENUINE APPRECIATION FOR BEING PERMITTED TO GO HOME FOR HIS MOTHER'S FUNERAL WHEN SHE PASSED APPROXIMATELY TWO MONTHS AGO. HE KNOWS HOW EXTRAORDINARY THAT WAS. HE THANKS MS. TEWKSBURY AND THE GOVERNMENT COUNSEL FOR THAT AND YOUR HONOR FOR THAT.

IT SHOWS THE KIND OF MAN HE IS. HE CAME HERE, YOUR HONOR, BECAUSE HE PUT HIS FAITH IN THIS JUSTICE SYSTEM. HE TALKED TO ME. HE TALKED TO OTHERS. HE'S AN INTELLIGENT MAN. HE CAME HERE BECAUSE HE BELIEVED IN THE FAIRNESS AND DIGNITY OF THIS GREAT SYSTEM WE ARE BLESSED TO HAVE IN AMERICA. HE'S STILL HERE DESPITE ALL THAT'S HAPPENED. AND HE PUTS HIS FAITH IN THE SYSTEM, AND I THINK TODAY IN ITS OWN WAY ONLY REAFFIRMS HIS FAITH IN THE SYSTEM.

I JUST WANT TO FINISH BY POINTING OUT WITH A PLEA THAT ALTHOUGH WE APPRECIATE HOW CAREFULLY YOUR HONOR HAS THOUGHT OUT THE SENTENCE YOU DESCRIBED, HOW FAR BELOW THE DRACONIAN OUTCOME THAT THE GUIDELINES WOULD REQUEST AND THE GOVERNMENT HAS REQUESTED YOUR HONOR'S SENTENCE IS, RECOGNIZING ALL OF THOSE THINGS, I WOULD ASK YOUR HONOR TO CAREFULLY CONSIDER WHETHER A SHORTER SENTENCE WOULD BE APPROPRIATE HERE BASED ON THE THINGS I'VE TRIED TO EMPHASIZE AS BEST AS I CAN. IT'S SO HARD TO DESCRIBE SOMEONE'S LIFE, A 60-YEAR-OLD MAN'S LIFE, WHO'S DONE WHAT HE'S DONE.

THIS IS NEITHER HERE NOR THERE, BUT OBSERVING HIM

EVERY DAY DURING THIS TRIAL AND THE WAY HE CONDUCTED HIMSELF RELATIVE TO OTHER CLIENTS UNDER SIMILAR CIRCUMSTANCES HAS BEEN ONE OF THE MOST EXTRAORDINARY EXPERIENCES OF MY CAREER AS A LAWYER, HIS DIGNITY, HIS DECENCY, FROM THE FIRST FLOOR OF THIS BUILDING WITH THE GUARDS TO THIS COURTROOM AND YOUR HONOR. HE'S AN EXTRAORDINARY MAN.

HE'S MADE ME A BETTER PERSON IN TERMS OF MY PARENTS WHO ARE AGING AND HAVE ISSUES LIKE HIS. I FEEL HUMBLED TO WATCH WHAT HE'S DONE OVER THE LAST TWO YEARS UNDER THE STRESS HE'S BEEN UNDER VIS-A-VIS HIS OWN PARENTS. IT'S JUST REMARKABLE.

ALL OF THOSE FACTORS TOGETHER -- I WON'T BELABOR THE DISPARITY POINT, EXCEPT TO POINT OUT THAT WITH A PERSON LIKE C.C. LIU AND SOME OF THE OTHERS WHO HAVE BEEN MENTIONED IN A SEVEN-MONTH SENTENCE, IT SEEMS TO ME THAT SOMETHING LESS THAN 36 MONTHS BRINGS US MORE IN LINE WITH A RESULT THAT RIGHTLY CREDITS THE COOPERATORS FOR COOPERATION, THAT RIGHTLY CREDITS THE FACT THAT THESE GENTLEMEN DECIDED TO GO TO TRIAL AND NOT COOPERATE. THERE HAS TO BE SOME DIFFERENCE. WE ACCEPT THAT.

BUT IF YOU LOOK AT C.C. LIU'S ROLE IN THIS THING AND HIS SEVEN-MONTH SENTENCE, IT JUST STRIKES ME, YOUR HONOR, TO GO FROM SEVEN MONTHS TO C.C. LIU TO 36 MONTHS JUST AS THE PRICE OF ADMISSION TO EXERCISING A TRIAL, WITH ALL ITS DIGNITY AND THE FAIR WAY IT WAS CONDUCTED, TO EXERCISE THAT RIGHT AND HAVE THE PRICE OF ADMISSION TO THIS GREAT COURTROOM AND A JURY BE 29

MORE MONTHS IS -- RESPECTFULLY, WE WOULD ASK THAT IT BE LESS THAN THAT. I THINK IT'S FAIR.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

MR. HUSTON: THANK YOU, YOUR HONOR.

YOUR HONOR, I APPRECIATE, AS DEFENSE COUNSEL DOES, THE THOUGHT THAT YOU PUT INTO THIS AND YOUR COMMENTS AT THE OPENING OF TODAY'S HEARING, BUT I DID WANT TO RISE TO SAY THAT I BELIEVE THE SENTENCES FOR THE INDIVIDUALS ARE NOT APPROPRIATE. THE MAIN POINT I'D LIKE TO MAKE HAS TO DO WITH GENERAL DETERRENCE, WHICH IS ONE OF THE FACTORS UNDER 3553. AND GENERAL DETERRENCE IS, MOST PEOPLE AGREE, ESPECIALLY IMPORTANT WITH RESPECT TO WHITE COLLAR CRIMES. THESE ARE CRIMES THAT ARE NOT CRIMES OF PASSION. THEY'RE THOUGHT OUT. AND THEY CAN BE STOPPED, AND THAT'S WHAT WE AT THE ANTITRUST DIVISION ARE TRYING TO DO, STAMP THEM OUT.

AND CONGRESS HAS DETERMINED THAT FOR THE WORST OFFENSES OF THIS TYPE WHERE THEY ARE EGREGIOUS, AND THERE ARE NO POSSIBILITIES FOR DISCOUNT, NO REASON TO DISCOUNT WHAT'S GONE ON, THAT THE APPROPRIATE SENTENCE IS 120 MONTHS, AND THAT'S WHAT WE BELIEVE IS APPROPRIATE HERE, AND THAT'S WHAT WE'VE ASKED FOR.

WITH RESPECT TO 36 MONTHS, I THINK THIS KEYS OFF OF WHAT MR. ATTANASIO JUST SAID, THAT IT IS DISPROPORTIONATE ON THE LOW SIDE. AND I'LL JUST GIVE ONE EXAMPLE OF THAT.

J.Y. HO, WHO TESTIFIED AT TRIAL, RECEIVED 14 MONTHS IN JAIL. BUT AS THE COURT MENTIONED, HE WAS IN A FAR DIFFERENT CIRCUMSTANCE THAN THESE DEFENDANTS. FOR ONE THING, HE PROVIDED VERY VALUABLE COOPERATION TO THE GOVERNMENT IN HELPING TO BRING THIS CRIME TO JUSTICE. SECONDLY, HE WAS OUT OF THE CONSPIRACY BY THE END OF 2001. THIS CONSPIRACY ONLY GOT STARTED IN SEPTEMBER, AND BY THE END OF 2001, HE WAS NO LONGER ATTENDING MEETINGS, AND HE RECEIVED 14 MONTHS.

SO BASED ON THOSE TWO THINGS, I THINK THAT THE SENTENCES OF 36 MONTHS ARE DISPROPORTIONATE ON THE LOW SIDE.

I DON'T HAVE ANY REASON TO DOUBT THE SINCERITY OR THE TRUTH OF THE LETTERS THAT THE COURT HAS RECEIVED ON BEHALF OF DR. HSUING AND H.B. CHEN, BUT THESE CHARACTERISTICS OF SUPPORTIVE FAMILY MEMBERS, RESPECTIVE COLLEAGUES, GIVERS TO CHARITY, THESE ARE TYPICAL OF THE SORTS OF CHARACTERISTICS YOU WOULD SEE OF PEOPLE IN THEIR POSITIONS, AND THE SENTENCING COMMISSION TOOK THAT INTO ACCOUNT WHEN THEY DETERMINED WHAT SENTENCES WERE APPROPRIATE FOR THIS CRIME.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

MR. CHEN -- WELL, LET ME SAY THIS: MR. HA, DO YOU WANT TO SAY ANYTHING ON BEHALF OF EITHER AUO OR AUOA BEFORE I SENTENCE THE COMPANIES?

MR. HA: NO, YOUR HONOR.

THE COURT: MR. CHEN, DID YOU WISH TO SAY ANYTHING?

DEFENDANT CHEN: NO, YOUR HONOR.

THE COURT: THANK YOU.

MR. KUMA, DID YOU WISH TO SAY ANYTHING?

DEFENDANT HSIUNG: NO, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, I DO FIND THAT THE DETERMINATIONS THAT I ARTICULATED EARLIER BEFORE YOU ALL SPOKE REMAIN MY DETERMINATIONS AND MY FINDINGS. SO, THOSE WILL BE THE FINDINGS OF THE COURT. AND AT THIS TIME WHAT I WILL DO IS IMPOSE THE SENTENCES, SO I WILL DO THAT IN THE ORDER THAT WE HAVE BEEN DESCRIBING.

OH, LET ME -- LET ME SAY THIS: I DO NOT FIND THAT SUPERVISED RELEASE IS APPROPRIATE FOR EITHER OF THE INDIVIDUAL DEFENDANTS. SO IF ANYBODY WANTS TO BE HEARD ABOUT THAT, YOU MAY, BUT I DO NOT PLAN TO DO THAT. WE'VE HAD ENOUGH OF THE NO-EXTRADITION-TREATY DISCUSSION ALREADY. I JUST DON'T SEE ANY POINT IN THAT.

THE SECOND THING IS, AS TO AUO, THE PROBATION OFFICER RECOMMENDED THAT THE COURT ORDER AUO TO AT ITS OWN EXPENSE ACKNOWLEDGE THE NATURE OF THE OFFENSE COMMITTED, THE FACT OF CONVICTION, THE NATURE OF THE PUNISHMENT IMPOSED, AND THE STEPS THAT WILL BE TAKEN TO PREVENT THE RECURRENCE OF SIMILAR OFFENSES IN THREE MAJOR TRADE PUBLICATIONS IN BOTH THE U.S. AND TAIWAN.

DID YOU WANT TO ADDRESS THAT? I'M NOT KEEN ON THAT.

MS. TEWKSBURY: WELL, YOUR HONOR. WE THINK IT'S

NECESSARY. THIS COMPANY HAS CONTINUALLY SAID THAT WHAT THEY'VE DONE IS NOT WRONG. THEY ARE CONTINUING TO MAKE THOSE STATEMENTS IN THE PRESS. THEY CLAIM THAT THEY JUST RECENTLY STARTED DEVELOPING A COMPLIANCE PROGRAM, WHICH IS SOMETHING I WAS GOING TO RESPECTFULLY ASK THE COURT IF IT WAS GOING TO ADDRESS THE PROBATION COMPLIANCE PROGRAM AS WELL.

THE COURT: I THINK THAT'S APPROPRIATE. AND SOMEBODY REQUESTED A MONITOR, AND I THINK THAT'S APPROPRIATE, TOO.

MS. TEWKSBURY: CORRECT. THANK YOU, YOUR HONOR.

THE COURT: BUT THE --

MS. TEWKSBURY: WE THINK THIS IS IMPORTANT FOR -- PARTICULARLY FOR THE TRADE PUBLICATIONS IN TAIWAN, THAT AUO MAKE A PUBLIC STATEMENT ABOUT WHAT IT'S DOING TO CORRECT WHAT'S HAPPENED IN THE PAST. THEY HAVE DONE NOTHING EVEN APPROACHING ACCEPTING RESPONSIBILITY FOR THIS, AND THEY CONTINUE TO SAY WHAT THEY'VE DONE AND THEY CONTINUE TO ARGUE IN THEIR PAPERS WHAT THEY'VE DONE IS NOT EVEN ILLEGAL.

SO, WE DO THINK IT IS APPROPRIATE, ESPECIALLY IN TAIWAN WHERE MR. J.Y. HO, ACTUALLY, AS A CONDITION OF HIS SENTENCE, HE EVEN GAVE PUBLIC SPEECHES TO PEOPLE IN TAIWAN TO TALK ABOUT THE ANTITRUST LAWS HERE AND WHAT HE DID TO RECTIFY THE SITUATION IN TAIWAN. WE DO THINK IT'S APPROPRIATE FOR AUO TO DO SOMETHING SIMILAR THROUGH THE TRADE PUBLICATIONS THERE.

MR. OSTERHOUDT: YOUR HONOR, RESPECTFULLY, THIS JUDGMENT IS NOT FINAL. THE COURT IS AWARE IT'S GOING TO BE

APPEALED. THE GOVERNMENT --

THE COURT: ACTUALLY, I THINK -- ISN'T IT FINAL UNTIL THEY DO SOMETHING TO IT? I'M PRETTY SURE THAT'S HOW IT WORKS.

MR. OSTERHOUDT: LET ME RECTIFY WHAT I SAID.

THIS IS NOT THE LAST STAGE IN THE PROCEEDINGS. EVERYONE WOULD AGREE THAT ALL OF THE DEFENDANTS MAINTAIN THEIR RIGHT AGAINST SELF-INCRIMINATION UNTIL THERE'S BEEN A FINAL DISPOSITION OF THE CASE. AND THE GOVERNMENT IS ATTEMPTING TO HAVE THE DEFENDANTS -- YOU CAN BE ASSURED THAT THEIR STATEMENTS OF LIABILITY WOULD FIND ITS WAY INTO THE GOVERNMENT'S BRIEF ON APPEAL AS A CONCESSION OF GUILT. SO IT'S CERTAINLY NOT APPROPRIATE AT THIS TIME, YOUR HONOR.

THE COURT: I TELL YOU WHAT I'M GOING TO DO. I THINK IT IS APPROPRIATE THAT THE CORPORATION AT ITS OWN EXPENSE PUBLISH THE FACT THAT IT WAS CONVICTED, THE NATURE OF THE PUNISHMENT IMPOSED, AND THE STEPS THAT WILL BE TAKEN TO PREVENT THE RECURRENCE, WHICH WOULD BE THE COMPLIANCE PROGRAM.

MS. TEWKSBURY: CORRECT, YOUR HONOR.

THE COURT: I WILL ORDER THAT, BUT "ACKNOWLEDGE THE NATURE OF THE OFFENSE COMMITTED," I'M GOING TO REMOVE FOR AT ALL REASONS ARTICULATED BY MR. RIORDAN.

MS. TEWKSBURY: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT.

PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT'S THE JUDGMENT OF THE COURT THAT AU OPTRONICS CORPORATION IS

HEREBY PLACED ON PROBATION FOR THREE YEARS.

WHILE ON PROBATION, AU OPTRONICS CORPORATION SHALL NOT COMMIT ANOTHER FEDERAL STATE OR LOCAL CRIME.

AU OPTRONICS CORPORATION SHALL DEVELOP, ADOPT AND IMPLEMENT AN EFFECTIVE COMPLIANCE AND ETHICS PROGRAM. SUCH A PROGRAM SHALL ESTABLISH STANDARDS AND PROCEDURES TO PREVENT AND DETECT CRIMINAL CONDUCT.

AU OPTRONICS CORPORATION SHALL NOTIFY ITS EMPLOYEES AND SHAREHOLDERS OF ITS CRIMINAL BEHAVIOR, WHAT DOES THAT MEAN?

MS. TEWKSBURY: IT'S JUST WHAT IT'S BEEN CONVICTED OF, YOUR HONOR.

THE COURT: OKAY.

...SHALL NOTIFY ITS EMPLOYEES AND SHAREHOLDERS OF ITS CONVICTION IN THIS CASE AND ITS EFFECTIVE COMPLIANCE AND ETHICS PROGRAM. ALL ASPECTS OF THE PROGRAM SHALL BE REPORTED TO THE PROBATION OFFICER AS DIRECTED, AND QUARTERLY REPORTS DETAILING THE ORGANIZATION'S PROGRESS SHALL BE SUBMITTED TO ENSURE COMPLIANCE.

AU OPTRONICS CORPORATION SHALL, AT ITS OWN EXPENSE, ACKNOWLEDGE THE FACT OF CONVICTION, THE NATURE OF THE PUNISHMENT IMPOSED, AND THE STEPS THAT WILL BE TAKEN TO PREVENT THE RECURRENCE OF SIMILAR OFFENSES IN THREE MAJOR TRADE PUBLICATIONS IN BOTH THE UNITED STATES AND TAIWAN.

AU OPTRONICS CORPORATION SHALL PAY TO THE UNITED STATES A FINE OF $500 MILLION WHICH SHALL BE DUE IMMEDIATELY.

PAYMENT OF CRIMINAL MONETARY PENALTY SHALL BE MADE TO THE CLERK OF THE U.S. DISTRICT COURT AT THIS ADDRESS.

MR. RIORDAN: YOUR HONOR?

THE COURT: LET ME JUST FINISH ONE THING, AND THEN WE WILL GET BACK TO IT.

IT IS FURTHER ORDERED THAT AU OPTRONICS CORPORATION SHALL PAY TO THE UNITED STATES A SPECIAL ASSESSMENT OF $400 WHICH IS DUE IMMEDIATELY.

OKAY.

MR. RIORDAN: YOUR HONOR, WE HADN'T DISCUSSED THE PAYMENT SCHEDULE, YOUR HONOR, SO LET ME ADDRESS THAT. IT ACTUALLY REQUIRES A FEW MINUTES.

THE COURT HAS IMPOSED A FINE OF $500 MILLION. THE EFFECT OF THAT IS THAT AUO WILL NOW IMMEDIATELY, REGARDLESS EVEN IF THERE'S A STAY, NEED TO BOOK THAT $500 MILLION AS A LIABILITY UNDER SECURITIES LAW. EVERY OTHER DEFENDANT IN THIS CASE HAS BEEN ALLOWED TO PAY THEIR FINE IN SIX INSTALLMENTS OVER FIVE YEARS, WHICH WOULD MEAN BASICALLY SIX INSTALLMENTS OF ABOUT 83 MILLION DOLLARS.

IT IS SIMPLY TRUE THAT IF THIS COURT WERE TO ORDER THE AUO TO PAY $500 MILLION -- IT DOES NOT HAVE ANYTHING APPROACHING $500 MILLION, NOTHING APPROACHING IT, WHAT WILL HAPPEN THEN IS THAT THE $6.54 BILLION IN LOANS THAT AUO HAS WILL AUTOMATICALLY BECOME PAYABLE IN FULL, BECAUSE ALL OF THOSE LOANS, AS LOANS GENERALLY DO, HAVE A MATERIALLY-ADVERSE-CHANGE

CLAUSE IN THEM, MEANING THAT IF ANY FINANCIAL CONDITION CHANGES WHICH THREATENS THE ABILITY OF THE LOAN TO BE REPAID, THEN IT'S FULLY REPAYABLE.

ALL OF AUO -- 80 PERCENT OF -- ALL OF THAT $6.54 BILLION IS SECURED TO THE BANKS WHO LENT THE MONEY. SO THE EFFECT OF IT WILL BE THAT THOSE BANKS, NOT THE GOVERNMENT WITH ITS $500 MILLION FINE, NOT RESTITUTION, NOBODY ELSE, THOSE BANKS WILL BE IMMEDIATELY ENTITLED TO SEIZE $6.54 BILLION FROM AUO.

THE COURT: DIDN'T THE CONVICTION -- I MEAN THE VERDICT, DIDN'T THAT TRIGGER THAT SORT OF THING ON THE PART OF THE BANKS?

MR. RIORDAN: THESE ISSUES HAD TO BE RAISED AND DISCLOSED PUBLICALLY. THERE WAS NO FINE IMPOSED AT THE TIME.

EVERYONE -- THERE'S BEEN TREMENDOUS -- THERE'S BEEN TREMENDOUS SPECULATION. ACTUALLY, AS A RESULT OF THE COURT'S -- THE VERDICT, THERE WAS IMMEDIATE 10 PERCENT DROP IN STOCK PRICE AT THAT TIME.

SO IT'S UNFULFILLABLE. AUO HAS AT BEST $80 MILLION IN CASH AT THE MOMENT.

LET ME SAY SOMETHING BECAUSE THE GOVERNMENT RAISED IT. IT SAID, OH, AUO DIDN'T TELL YOU THAT IT'S GOT A RESERVE FOR THIS FINE WITH MONEY IN IT. THAT'S ABSOLUTELY FALSE.

WHAT HAPPENS IS THAT AUO, BECAUSE IT WAS ANTICIPATING A FINE, TOOK A NUMBER AND PUT IT ON ITS LIABILITY BOOKS. OKAY?

WE'VE GOT A HIT COMING UP. IT'S NOT MONEY. IT IS PUTTING ON YOUR LIABILITY SECTION.

I'LL TELL YOU WHAT THE NUMBER WAS. IT WAS $277 MILLION. SO THEY ADDED -- AND THAT WILL BE DISCLOSED IN AN SEC FILING TONIGHT OR TOMORROW.

SO IT PUT A $277 MILLION LIABILITY ON ONE SIDE OF THE BOOKS. IT DOESN'T HAVE THAT CASH. IT DOES NOT HAVE ANYWHERE NEAR $500 MILLION WORTH OF CASH.

AND, FINALLY, IF THEY ARE ORDERED TO PAY THAT IMMEDIATELY, WHAT WILL HAPPEN IS WHAT I THINK THE GOVERNMENT HAS BEEN AFTER EVER SINCE THEY DECIDED TO GO TO TRIAL, THEY WILL KILL THIS COOPERATION.

SO ALL WE ARE ASKING FOR IS THE SAME PAYMENT SCHEDULE THAT A LEVIATHAN LIKE LG GOT. THEY GOT TO PAY THEIR $400 MILLION IN SIX PAYMENTS. SAMSUNG GOT NOTHING, BUT...

THE COURT: CAN YOU DO IT WITHOUT THESE CATASTROPHIC CONSEQUENCES IN THREE YEARS SO IT COULD BE PAID OUT OVER THE PROBATIONARY PERIOD?

MR. RIORDAN: I DON'T KNOW THE ANSWER TO THAT, YOUR HONOR.

THE COURT: WOULD YOU CHECK?

MR. RIORDAN: I DON'T KNOW THE ANSWER TO THAT.

CAN I MAKE A SUGGESTION, YOUR HONOR? CAN WE -- BECAUSE THIS IS NOT, YOU KNOW, A CURBSIDE DECISION. MY SUGGESTION IS THAT WE SUBMIT -- THE COURT HAS SAID, I AM

CONSIDERING IMPOSING THE FINE OVER THREE YEARS RATHER THAN FIVE YEARS, ADDRESS THAT QUESTION IN YOUR PAPERS, BECAUSE --

THE COURT: YOU KNOW, I'M SORRY TO TELL YOU THIS, MR. RIORDAN --

MR. RIORDAN: I KNOW, YOU'RE TIRED --

THE COURT: -- YOU HAVE EXHAUSTED MY INTEREST IN YOUR PAPERS. THERE HAVE BEEN SO MANY.

MR. RIORDAN: I CANNOT -- I CANNOT GIVE YOU AN ANSWER TO THAT QUESTION, YOUR HONOR. I CANNOT GIVE YOU AN ANSWER ABOUT WHAT THE EFFECT WOULD BE.

YOU KNOW, WE'RE WILLING TO PUT A FINANCIAL -- THE YANG DECLARATION IS BEFORE YOU, YOU KNOW. THE $6.54 BILLION WORTH OF DEBTS IS INDISPUTABLE.

I JUST CAN'T GIVE YOU AN ANSWER AS TO -- WE HAVE DISCUSSED THIS AT GREAT LENGTH. WE NEVER DISCUSSED THE QUESTION OF WHETHER THREE YEARS, AS OPPOSED TO NOW, AS OPPOSED TO FIVE YEARS WAS POSSIBLE. SO I LEAVE MYSELF OPEN TO THE COURT'S SUGGESTION ON HOW WE SHOULD DEAL WITH IT. BUT I WOULD IMPLORE THE COURT NOT TO ANNOUNCE TODAY THAT IT IS GOING REQUIRE AUO TO PAY $500 MILLION WITHIN THE NEXT 48 HOURS, BECAUSE THE FINANCIAL CONSEQUENCES OF THAT ARE ONES THAT THE COURT HASN'T YET HAD A CHANCE TO FAIRLY CONSIDER.

MR. SNYDER: BRENT SNYDER FOR THE UNITED STATES.

YOUR HONOR, MR. RIORDAN STOOD UP HERE AND GAVE YOU EXTENSIVE FINANCIAL INFORMATION ABOUT THE COMPANY, NONE OF

WHICH IS CONTAINED IN THEIR OWN CFO'S DECLARATION, ALL THE CATASTROPHIC THINGS THAT WILL RESULT FROM THE PAYMENT OF A $500 MILLION FINE. YOU WOULD HAVE TO MAKE THAT DECISION PURELY ON HIS UNSUPPORTED TESTIMONY HERE THIS MORNING, AND THAT WOULD BE UTTERLY INAPPROPRIATE.

THE ONLY EVIDENCE YOU HAVE IN FRONT OF YOU REGARDING THE COMPANY'S RESERVES IS THE DEPOSITION TESTIMONY OF THE COMPANY'S PRESIDENT WHO SAID WE HAVE FOLLOWED THE ACCOUNTANT'S INSTRUCTIONS TO SET ASIDE RESERVES. THAT INDICATES, AS HE SAID IN A SWORN DEPOSITION, THAT THEY HAVE SET ASIDE MONEY TO PAY AT LEAST A SUBSTANTIAL AMOUNT OF THIS FINE.

HE ALSO SAID THE COMPANY HAS RUN FINANCIAL SIMULATIONS TO ENSURE THEY WOULD BE ABLE TO CONDUCT THEIR OPERATIONS IF THE FINES WERE IMPOSED AT THE HIGHEST LEVELS, WHICH PRESUMABLY WOULD HAVE BEEN THE ONE BILLION DOLLARS WHICH WAS A POSSIBILITY AFTER THE JURY'S VERDICT.

THE ANTITRUST DIVISION HAS CONDUCTED ABILITY-TO-PAY ASSESSMENTS ON APPROXIMATELY 20 OCCASIONS. WE HAVE ALWAYS USED THE SAME EXPERT TO DO IT.

HE TAKES MONTHS TO GO THROUGH A COMPANY'S FINANCIAL INFORMATION AND TO ASSESS, FIRST, CAN THEY MAKE PAYMENTS OVER AN INSTALLMENT PERIOD? AND, SECONDLY, CAN THEY -- WHAT IS THE FINE THAT THEY CAN AFFORD TO PAY WITHIN THAT INSTALLMENT RANGE?

NONE OF THAT HAS BEEN DONE HERE. YOU HAVE REALLY THE TESTIMONY OF COUNSEL, UNSUPPORTED EVEN BY THE CFO'S

DECLARATION. THEY'RE SAYING IF YOU DO THIS TO US, IT'S GOING TO BE CATASTROPHIC.

THE COURT: WHAT DID YOU THINK WAS GOING TO HAPPEN IF I AGREED WITH YOU AND IMPOSED A ONE BILLION DOLLAR FINE AND SAID IT WAS DUE TODAY? WHAT DID YOU THINK WAS GOING TO HAPPEN?

MR. SNYDER : THAT THE COMPANY WOULD BE REQUIRED TO PAY IT OR COME FORWARD AND PROVIDE ADEQUATE BASIS FOR SOME SORT OF A DEFERRAL OR INSTALLMENT PAYMENT SCHEDULE, WHICH I WOULD HAVE EXPECTED THEY WOULD HAVE BEEN IN A POSITION TO DO.

THE SUBMITTED THE CFO'S DECLARATION. HE DIDN'T ADDRESS THIS ISSUE. HE DIDN'T INCLUDE ANY OF THESE THINGS. AND NOW THEY'RE SAYING TO YOU, WE ARE NOT PREPARED TO DO IT, OR YOU SHOULD JUST TAKE OUR WORD FOR IT.

I WOULD HAVE EXPECTED THEM TO BE PREPARED TO COME HERE TODAY AND SUBSTANTIATE THEIR REQUEST, AND THEY HAVEN'T DONE THAT. SO, THE UNITED STATES BELIEVES IT WOULD BE INAPPROPRIATE AT THIS TIME TO MAKE A DECISION THAT THE COMPANY CANNOT AFFORD TO PAY THE FINE THAT'S IMPOSED, OR THEY CAN'T AFFORD TO PAY IT TODAY, OR SOME REASONABLE PERIOD OF TIME AFTER THE IMPOSITION OF JUDGMENT.

MR. RIORDAN: YOUR HONOR, THE DECLARATION OF MR. YANG LAYS OUT THESE DETAILS IN GREAT DETAIL. AND IF THE GOVERNMENT IS SAYING IT WANTS AN EVIDENTIARY ORDER ON THIS ISSUE, WE ARE PREPARED TO CALL A FINANCIAL OFFICER OF THE COMPANY TO DO THAT RIGHT NOW.

THE COURT: I DO NOT FEEL IT NECESSARY TO HAVE A FINANCIAL -- AN EVIDENTIARY HEARING ON THIS MATTER.

WHAT I WILL ORDER IS THAT THE $500 MILLION FINE BE PAYABLE OVER THE TERM OF PROBATION, WHICH IS THE THREE-YEAR TERM.

NOW, MR. MABIE, IS THAT -- CAN THE SCHEDULE THEN BE WORKED OUT AS BETWEEN THE DEFENDANT AND THE PROBATION OFFICER IF I SAY THAT?

MR. MABIE: WELL, YOUR HONOR, I THINK THAT THE COURT HAS TO SET THAT AND ACKNOWLEDGE IT. SO WE COULD SUBMIT SOMETHING, OR I CAN ASK THE PARTIES TO SUBMIT SOMETHING TO THE COURT SO IT GOES ON THE RECORD THAT YOU DIRECT THEM THAT THEY PAY THE SET AMOUNT EACH MONTH, OR WHATEVER THE AMOUNT IS. BUT -- I'M SORRY FOR NOT STANDING, YOUR HONOR -- BUT THE COURT DOES HAVE TO SET THAT AMOUNT.

MR. SNYDER : THE GOVERNMENT WOULD RECOMMEND IMMEDIATE PAYMENT OF $275 MILLION AND THEN THE BALANCE PAYABLE IN EQUAL INSTALLMENTS OVER THREE YEARS IN FOUR PAYMENTS.

MR. RIORDAN: AS I SAY, YOUR HONOR, THE GOVERNMENT'S OBJECTIVE IS TO THE KILL THIS COOPERATION.

THREE YEARS IS FOUR PAYMENTS, AND THE FAIR THING FOR THE COURT TO DO IS ORDER A FOURTH OF THAT PAYABLE IN THE PERIOD AS IT DID WITH THE OTHER DEFENDANTS. WE WOULD ASK IT BE 120 DAYS, WITH THE SECOND PAYMENT A YEAR AFTER THAT, THE THIRD PAYMENT A YEAR AFTER THAT, AND THE LAST PAYMENT, YOU KNOW, AT

THE END OF THE PROBATIONARY PERIOD. SO THAT'S $125 MILLION. AGAIN, $275 MILLION IN CASH RIGHT NOW IS SIMPLY ABSOLUTELY IMPOSSIBLE. THE YANG DECLARATION BEARS THAT OUT.

THERE IS NOTHING -- THERE IS, AT MOST, $80 MILLION OF CASH AVAILABLE TO THE CORPORATION AT THE MOMENT.

MR. HUSTON: YOUR HONOR, ONLY BECAUSE HE SAID IT A SECOND TIME -- PETER HUSTON, BY THE WAY -- I FEEL COMPELLED TO SAY THAT IT IS NOT THE GOVERNMENT'S DESIRE TO KILL THIS CORPORATION. IT'S THE GOVERNMENT'S DESIRE TO BRING THOSE THAT PERPETRATED THIS CRIME TO JUSTICE. I FIND IT SLIGHTLY OFFENSIVE THAT HE SAID THAT, OR MORE THAN SLIGHTLY.

THE COURT: I DON'T BELIEVE THAT FOR A MINUTE, MR. HUSTON. I DON'T BELIEVE WHAT HE SAID.

AND I ALSO THINK THAT ONE THING WE NEED TO UNDERSTAND, AND THIS IS PROBABLY WHAT YOU HAVE BEEN STRUGGLING WITH ALL THIS TIME, IS THAT THIS WAS A DOCUMENTED, FAR-REACHING, CLEARLY ILLEGAL CONSPIRACY TO FIX PRICES. I DON'T THINK THERE'S ANY QUESTION ABOUT THAT.

THE PRODUCT IS REALLY, REALLY GOOD AND HAS CHANGED EVERYTHING. SO THERE WOULD BE NO SOCIAL UTILITY IN KILLING THE MESSENGER ON THAT, AND I AGREE WITH THAT, AND I THINK YOU PROBABLY AGREE WITH THAT AS WELL.

ON THE OTHER HAND, TO IMPOSE A -- IN A CONTEXT LIKE THIS, TO IMPOSE A PUNISHMENT THAT IS SEVERE ENOUGH TO ACTUALLY MAKE PEOPLE CHANGE THEIR POOR JUDGMENT AND BAD CHOICE CONDUCT

IS A STRUGGLE.

SO I'M GOING TO ORDER THAT THE CORPORATION PAY A FINE OF $500 MILLION, WHICH IS PAYABLE AS FOLLOWS: ONE QUARTER WITHIN 120 DAYS OF TODAY, ONE QUARTER WITHIN ONE YEAR -- ANOTHER QUARTER WITHIN ONE YEAR OF TODAY, ANOTHER QUARTER WITHIN TWO YEARS OF TODAY, AND THE FINAL QUARTER WITHIN THREE YEARS OF TODAY.

WHAT ABOUT INTEREST, MR. MABIE, DO I HAVE TO SAY SOMETHING ABOUT THAT?

MR. MABIE: EITHER INTEREST IS WAIVED OR NOT WAIVED.

THE COURT: WHAT WOULD YOU RECOMMEND?

MR. MABIE: I WOULD SAY, YOUR HONOR, GIVEN THE CIVIL LIABILITIES, I THINK THAT INTEREST SHOULD BE WAIVED ON THIS.

THE COURT: ALL RIGHT. INTEREST IS WAIVED.

MS. TEWKSBURY: YOUR HONOR?

THE COURT: AND THE PAYMENTS ARE MADE TO THE COURT AT THIS ADDRESS.

YES, MA'AM.

MS. TEWKSBURY: I WOULD INDICATE I DON'T BELIEVE THE OTHER PLEADING COMPANIES HAVE THEIR INTEREST WAIVED.

THE COURT: I THOUGHT THEY DID, BUT I COULD BE WRONG ABOUT THAT.

MS. TEWKSBURY: THEIR AGREEMENTS DON'T INCLUDE WAIVER OF INTEREST. IT'S SET BY THE FEDERAL RESERVE, AND THEY PAY ACCORDINGLY.

MR. SNYDER: TYPICALLY INTEREST IS WAIVED ONLY IF THEY HAVE ESTABLISHED PROVEN INABILITY TO PAY. THAT WAS NOT THE BASIS OF ANY OF THE OTHER FINES. WE WOULDN'T EXPECT INTEREST WOULD HAVE BEEN WAIVED FOR THOSE.

MR. RIORDAN: I THOUGHT THE PSR RECOMMENDED -- WELL, I'M NOT SURE, YOUR HONOR.

THE COURT: IS THERE ANY WAY TO FIND OUT? I WOULD LIKE TO NOT WAIVE INTEREST IF WE DIDN'T WAIVE IT FOR THE OTHER DEFENDANTS BUT WAIVE IT IF WE DID.

THE CLERK: IF I CAN GET A CASE NUMBER OF SOMETHING, I COULD JUST LOOK, LIKE ANOTHER CORPORATION?

MS. TEWKSBURY: I DON'T HAVE ANOTHER CASE NUMBER, AND I HATE TO DO THIS BECAUSE I KNOW THE COURT WOULD PREFER TO DO THIS NOW. I'D LIKE TO BE ABLE TO PROVIDE YOU WITH THE INFORMATION.

THE CLERK: IS THERE A NAME, LIKE A COMPANY?

MS. TEWKSBURY: YOU COULD LOOK UP "LG DISPLAY." THAT WAS THE FIRST COMPANY TO PLEAD. IT WAS IN 2008, JANUARY.

THE COURT: FOR NOW I'M GOING TO SAY THAT INTEREST IS NOT WAIVED AND GO ON AND DO THE REST OF THE SENTENCING, BUT IF WE FIND OUT SOMETHING THAT WOULD CHANGE MY MIND, I'LL COME BACK AND CHANGE THAT.

MS. TEWKSBURY: THANK YOU.

WITH RESPECT TO AUO AMERICA --

MS. TEWKSBURY: I'M SORRY, YOUR HONOR, TO INTERRUPT

YOU AGAIN, BUT YOU DID NOT MENTION THE COMPLIANCE MONITOR. YOU MENTIONED THE PROGRAM AS INDICATED IN THE PSR, BUT THE PROBATION OFFICE DID NOT MENTION THE MONITOR IN THEIR RECOMMENDATION.

THE COURT: IN CONNECTION WITH THE ANTITRUST COMPLIANCE AND ETHICS PROGRAM, THE COMPANY SHALL APPOINT AND PAY FOR A MONITOR, IS THAT WHAT YOU'RE RECOMMENDING?

MS. TEWKSBURY: THAT'S CORRECT. THE PROCESS IS THE COMPANY PUTS UP THREE NAMES OF INDEPENDENT COUNSEL WHO HAVE SIGNIFICANT ANTITRUST BACKGROUND AND EXPERIENCE. THEY PRESENT THOSE THREE NAMES TO PROBATION. PROBATION CHOOSES AN INDEPENDENT MONITOR. THEY DO PASS THAT NAME BY US SO THAT WE CAN CONFIRM WHETHER THAT PERSON IS INDEPENDENT AND HAS THE REQUISITE ANTITRUST EXPERIENCE, BUT IT'S PROBATION'S DETERMINATION ON THE MONITOR. AUO DOES PAY THE EXPENSES ON THE MONITOR.

MR. CLINE: YOUR HONOR, MAY I MAKE A SUGGESTION? JOHN CLINE FOR AUO AMERICA.

FIRST, I WANT TO BE CLEAR THAT WE HAVE NO OBJECTION TO A COMPLIANCE PROGRAM AS A CONDITION OF PROBATION FOR EITHER COMPANY. THERE IS ONE IN PLACE. IT'S INCOMPLETE. IT'S IN THE PROCESS OF BEING DEVELOPED. WHAT IS PROBLEMATIC IS HAVING A MONITOR, PARTICULARLY WITH ALL THE CONDITIONS THAT THE GOVERNMENT PROPOSES IN ITS BRIEF. THERE'S NO PRIVILEGE. IT REPORTS TO THE ANTITRUST DIVISION, SO ON, ESPECIALLY WHEN YOU

ARE IN THE MIDST OF CONTINUING LITIGATION.

WHAT I'M ASKING, YOUR HONOR -- WHETHER IT'S ASKING FOR A STAY OR NO MONITOR AT ALL IS SORT OF UNCLEAR, BUT WHAT I WOULD SUGGEST IS YOU GIVE US A CHANCE UNDER PROBATION'S SUPERVISION, AND ULTIMATELY THE COURT'S SUPERVISION -- AND I DON'T MIND REPORTING TO THE ANTITRUST DIVISION WHAT WE'RE DOING -- GIVE US A CHANCE, WHICH WE ARE ALREADY IN THE PROCESS OF DOING, TO PUT INTO PLACE A FULLY ADEQUATE EFFECTIVE ANTITRUST COMPLIANCE PROGRAM. WE'RE WORKING ON IT.

NOW, THERE ARE OBVIOUSLY, WHEN YOU ARE DEALING WITH A TAIWANESE COMPANY, THERE ARE LANGUAGE ISSUES, CULTURAL ISSUES. THERE ARE ALL KINDS OF THINGS THAT NEED TO BE TAKEN INTO ACCOUNT.

I THINK WHAT YOU'LL FIND IS BY THE TIME THE APPEAL IS OVER, IF WE'RE TALKING IN TERMS OF A STAY OR, SAY, WITHIN A YEAR, WE WILL HAVE A COMPLIANCE PROGRAM IN PLACE THAT IS ACCEPTABLE TO THE GOVERNMENT, ACCEPTABLE TO PROBATION, AND ACCEPTABLE TO THE COURT WITHOUT THE EXPENSE AND JUST THE SORT OF LOGISTICAL DIFFICULTIES HIRING A MONITOR IS GOING TO CREATE, PARTICULARLY WHEN WE'RE ALSO IN THE MIDST OF LITIGATION ON APPEAL WITH THE GOVERNMENT AND THERE'S STILL THE CIVIL MATTERS THAT ARE BEING WORKED OUT.

I JUST THINK THAT THE COURT WILL FIND THAT THAT IS AN UNNECESSARY EXPENSE AND IN SOME WAYS EVEN AN ENCUMBRANCE TO DEVELOPING WHAT I THINK WILL BE A STATE OF THE ART COMPLIANCE

PROGRAM WITHIN A PRETTY SHORT PERIOD OF TIME.

SO, WHAT I'M ASKING FOR, WHETHER YOU CALL IT A STAY OR A CONDITION OF PROBATION, GIVE US A CHANCE TO DO IT WITHOUT THE MONITOR.

MS. TEWKSBURY: YOUR HONOR, THIS IS A COMPANY THAT'S IN NEED OF AN INDEPENDENT COMPLIANCE MONITOR. THEY DIDN'T EVEN START SUPPOSEDLY DEVELOPING A COMPLIANCE PROGRAM UNTIL WELL AFTER THEY WERE INDICTED. THERE IS NO INDICATION WHAT THIS COMPLIANCE PROGRAM IS.

QUITE FRANKLY, WE CAN'T HAVE ANY FAITH THAT IT'S GOING TO PASS ANY SORT OF MUSTER. THE ANTITRUST DIVISION IS NOT IN BUSINESS OF COUNSELING COMPANIES ON COMPLIANCE. MR. CLINE IS INCORRECT WE WOULD HAVE ANYTHING TO DO WITH THIS COMPLIANCE PROGRAM.

IT IS FOR THE COMPLIANCE MONITOR WHO MONITORS THE PROGRAM TO MAKE SURE IT IS BEING EFFECTED PROPERLY, AND THE COMPLIANCE MONITOR REPORTS TO PROBATION ON A QUARTERLY BASIS.

YOU NEED AN INDEPENDENT PERSON TO DO THIS. THE COMPANY HAS INDICATED ITS CONDUCT IS NOT ILLEGAL. IS THIS GOING TO BE A COMPLIANCE PROGRAM BASED ON THE RULE OF REASON? I AM CONCERNED ABOUT THE COMPANY DOING ITS OWN COMPLIANCE PROGRAM, AND REPRESENTATIONS THAT IT'S GOING TO BE STATE OF THE ART IS GOING TO BE HOLLOW IN THIS CASE, AND WE STRONGLY RECOMMEND A COMPLIANCE MONITOR; OTHERWISE, THIS PROGRAM WILL BE HOLLOW.

MR. CLINE: ACTUALLY, YOUR HONOR, THE EXISTING PROGRAM IS NOT A RULE-OF-REASON THING AT ALL. IT'S DESIGNED TO PREVENT AND DISCOVER ANY SORT OF DISCUSSIONS WITH COMPETITORS ABOUT AGREEMENTS ON PRICES AND SO ON. AND THE ONE THAT WILL ULTIMATELY BE PRODUCED, I THINK, WILL -- I THINK IT WILL BE STATE OF THE ART.

THE COURT: THAT MAY BE, BUT I DON'T THINK IT WILL HURT TO HAVE A MONITOR IN PLACE. I WILL ORDER THAT THE MONITOR BE SELECTED IN ACCORDANCE WITH THE DIRECTIONS OF THE PROBATION OFFICER AND REPORT TO THE PROBATION OFFICER.

CAN I JUST LEAVE THAT UP TO THE PROBATION OFFICER TO FIGURE OUT HOW TO SELECT THE MONITOR AND PROCEED FROM THERE?

MR. MABIE: WE WOULD HAVE TO TAKE THAT UNDER ADVISEMENT, YOUR HONOR.

THE COURT: I'LL JUST DIRECT IT BE AT THE DIRECTION OF THE PROBATION OFFICER. IN THE EVENT WE NEED MORE CLARITY FROM THE COURT ON THAT, OR MORE STRUCTURE, IF THE PROBATION OFFICER LETS ME KNOW THAT, THEN WE CAN FIGURE OUT WHAT WE NEED DO. ALL RIGHT?

MS. TEWKSBURY: YOUR HONOR, IF I MAY? THE GOVERNMENT DID RECOMMEND A COMPLIANCE PROGRAM THAT ACTUALLY SPELLS OUT A PROCEDURE THAT WOULD ASSIST THE PROBATION OFFICE IN MAKING THAT DETERMINATION.

THE COURT: ALL RIGHT. AT THIS TIME I'M LEAVING THAT UP TO THE PROBATION OFFICER. IF WE NEED FURTHER CLARITY, OR

YOU HAVE ISSUES WITH ATTORNEY-CLIENT PRIVILEGE OR ANYTHING LIKE THAT, WE CAN ADDRESS IT WHEN THE ISSUES ARISE.

MS. TEWKSBURY: THANK YOU, YOUR HONOR.

THE COURT: THE COURTROOM DEPUTY HAS INDICATED IN THE LG DISPLAY CASE, 08 CRIMINAL 803, INTEREST WAS NOT WAIVED ON THE FINE. SO YOU WERE RIGHT ABOUT THAT, SO I'M NOT GOING TO WAIVE INTEREST ON THE PAYMENT OF THE FINE.

WITH RESPECT TO AUO AMERICA, PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT'S THE JUDGMENT OF THE COURT THAT AU OPTRONICS CORPORATION AMERICA IS HEREBY PLACED ON PROBATION FOR THREE YEARS. WHILE ON PROBATION AUOA SHALL NOT COMMIT ANOTHER FEDERAL, STATE, OR LOCAL CRIME.

THE PROVISION -- I'M INTENDING THAT THE PROVISION CONCERNING COMPLIANCE AND THE MONITOR FOR AUOA BE THE SAME AS COMPLIANCE AND THE MONITOR FOR AUO.

AU OPTRONICS CORPORATION AMERICA SHALL DEVELOP, ADOPT, AND IMPLEMENT AN EFFECTIVE COMPLIANCE AND ETHICS PROGRAM. SUCH A PROGRAM SHALL ESTABLISH STANDARDS AND PROCEDURES TO PREVENT AND DETECT CRIMINAL CONDUCT.

AU OPTRONICS CORPORATION AMERICA SHALL NOTIFY ITS EMPLOYEES AND SHAREHOLDERS OF ITS CRIMINAL CONVICTION AND ITS EFFECTIVE COMPLIANCE AND ETHICS PROGRAM.

ALL ASPECTS OF THE PROGRAM SHALL BE REPORTED TO THE PROBATION OFFICER AS DIRECTED, AND QUARTERLY REPORTS DETAILING THE ORGANIZATION'S PROGRESS SHALL BE SUBMITTED TO ENSURE

COMPLIANCE, AND A MONITOR SHALL BE ESTABLISHED IN THE SAME WAY A MONITOR IS ESTABLISHED VIS-A-VIS AUO.

THE IMPOSITION OF A CRIMINAL MONETARY FINE IS WAIVED. HOWEVER, IT IS ORDERED THAT AUOA PAY TO THE UNITED STATES A SPECIAL ASSESSMENT OF $400, WHICH IS DUE IMMEDIATELY.

WITH RESPECT TO MR. CHEN, PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT IS THE JUDGMENT OF THE COURT THAT HSUAN BIN CHEN, ALSO SOMETIMES DESCRIBED HERE AS H.B. CHEN, IS HEREBY COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS TO BE IN PRISON FOR A TERM OF 36 MONTHS. IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL PAY TO THE UNITED STATES A SPECIAL ASSESSMENT OF $100 WHICH IS DUE IMMEDIATELY.

WHILE INCARCERATED, PAYMENT OF CRIMINAL MONETARY PENALTIES IS DUE AT THE RATE OF NOT LESS THAN $25 PER QUARTER THROUGH THE BOP INMATE FINANCIAL RESPONSIBILITY PROGRAM.

IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL PAY TO THE UNITED STATES A FINE OF $200,000 WHICH IS DUE IMMEDIATELY, PAYABLE TO THE COURT AT THIS ADDRESS. AND NO SUPERVISED RELEASE IS IMPOSED TO FOLLOW.

WITH RESPECT TO DEFENDANT HUI HSUING, PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT IS THE JUDGMENT OF THE COURT THAT HUI HSUING, SOMETIMES CALLED HERE KUMA, IS HEREBY COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS TO BE IMPRISONED FOR A TERM OF 36 MONTHS. I'M NOT IMPOSING ANY SUPERVISED RELEASE TO FOLLOW.

IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL PAY TO THE UNITED STATES A SPECIAL ASSESSMENT OF $100, WHICH IS DUE IMMEDIATELY. WHILE INCARCERATED PAYMENT OF CRIMINAL MONETARY PENALTIES IS DUE AT NOT LESS THAN $25 PER QUARTER THROUGH THE BOP INMATE FINANCIAL RESPONSIBILITY PROGRAM. IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL PAY TO THE UNITED STATES A FINE OF $200,000, WHICH IS DUE IMMEDIATELY.

MR. OSTERHOUDT: YOUR HONOR, I BEG YOUR PARDON.

DR. HSUING INDICATED TO ME HE DOESN'T HAVE THAT MONEY RIGHT NOW IN A LIQUID FORM TO PAY TO THE UNITED STATES. COULD THAT BE STAYED FOR SOME PERIOD OF TIME?

THE COURT: HOW LONG? HOW ABOUT 60 DAYS?

MR. OSTERHOUDT: YOUR HONOR, DR. HSUING WAS SUGGESTING THAT PERHAPS SIX MONTHS.

THE COURT: I KNOW. I'M SUGGESTING PERHAPS TWO. HOW DOES THAT STRIKE YOU?

MR. OSTERHOUDT: I THINK IT WOULD BE DIFFICULT. I WANT TO BE ACCURATE. I'M SORRY.

(PAUSE IN PROCEEDINGS.)

MR. OSTERHOUDT: YOUR HONOR, COULD YOU PLEASE CONSIDER 120 DAYS TO PAY THIS?

THE COURT: OKAY. ONE HUNDRED TWENTY DAYS, PAYABLE IN 120 DAYS. DOES MR. CHEN WANT THE SAME THING?

MR. ATTANSIO: YES, YOUR HONOR. THANK YOU.

THE CLERK: WHAT ABOUT THE SPECIAL ASSESSMENT?

THE COURT: SPECIAL ASSESSMENT OF $100 IS DUE IMMEDIATELY.

MR. OSTERHOUDT: WE'LL PAY THAT, YOUR HONOR.

THE CLERK: I'M GOING TO GIVE YOU A FORM. DON'T GO UNTIL I GIVE YOU THE FORM.

MR. OSTERHOUDT: YOUR HONOR, IS THIS THE APPROPRIATE TIME TO DISCUSS THE PLACE OF SERVICE FOR HIS CONFINEMENT?

THE COURT: OH, YES.

MR. OSTERHOUDT: I WOULD RESPECTFULLY ASK -- CONSULTING WITH HIS FAMILY, AND I'VE LOOKED INTO THIS, IF HE WERE DESIGNATED BY THE BUREAU OF PRISON IN THE CAMP AT TAFT, CALIFORNIA, IT WOULD BE GEOGRAPHICALLY LOCATED IN A WAY THAT WOULD BE GOOD FOR HIS FAMILY VISITATION. I KNOW YOUR HONOR CAN'T CONTROL WHAT THE BUREAU DOES, BUT IF YOU WOULD RECOMMEND HIS CONFINEMENT TO CAMP AT TAFT -- HE'S CAMP ELIGIBLE -- THAT WOULD BE APPRECIATE.

THE COURT: ANY OBJECTION TO THAT ON THE GOVERNMENT'S PART?

MS. TEWKSBURY: NO, YOUR HONOR. IT'S UP TO THE COURT'S DISCRETION, AND BOP, OF COURSE.

THE COURT: YES, IT IS UP TO THE BOP, BUT I RECOMMEND MR. KUMA BE ASSIGNED TO CAMP TAFT IN CALIFORNIA SO TO BE AS CLOSE AS POSSIBLE TO HIS FAMILY.

MR. OSTERHOUDT: OF COURSE, WE WOULD ALSO RESPECTFULLY ASK -- I KNOW THERE WILL BE A MOTION FOR BAIL

PENDING APPEAL THAT MR. HANDMAN WOULD ARGUE, BUT WE ASK HE BE PERMITTED TO VOLUNTARILY SURRENDER.

MS. TEWKSBURY: WE DO NOT HAVE A PROBLEM WITH VOLUNTARY SURRENDER. WE WOULD LIKE TO ADDRESS, OBVIOUSLY, THE PAPERS ON THE MOTION.

THE COURT: YES.

HOW ABOUT MR. CHEN, DOES HE HAVE A GEOGRAPHICAL PREFERENCE?

MR. ATTANSIO: WE WOULD REQUEST THE SAME RECOMMENDATION, ACTUALLY EITHER TO TAFT OR LOMPOC, TO THE CAMP THERE.

MS. TEWKSBURY: YOUR HONOR, BECAUSE MR. CHEN IS NOT A U.S. CITIZEN, HE IS IMMEDIATELY REMOVABLE AND, THEREFORE, NOT ELIGIBLE TO DESIGNATE TO ANY OF THE WORK CAMPS. IT'S NOT A POSITION I'M TAKING; IT'S JUST A KNOWN FACT.

MR. ATTANSIO: COUNSEL IS CORRECT IN TERMS OF THE POLICY OF THE BOP. WE INTEND TO TRY TO ADDRESS THAT AND WORK THROUGH BOP CHANNELS TO HAVE HIM PUT IN A CAMP, DESPITE THAT REGULATION, TO SEEK A WAIVER OF IT. I WOULD NOTE THAT WITH THE GOVERNMENT'S APPROVAL, OTHER DEFENDANTS IN THIS CASE, SIMILARLY DEPORTABLE, HAVE BEEN PUT IN CAMPS.

SO AT LEAST IF WE HAVE YOUR HONOR'S RECOMMENDATION, WHICH I THINK ON THE MERITS IS THE RIGHT THING FOR A MAN LIKE MR. CHEN AND CRIME LIKE THIS, IT WILL DO WHAT IT DOES WITH BOP, AND THEY'LL APPLY THEIR RULES AS THEY SEE FIT, BUT I WOULD ASK

AT LEAST FOR YOUR HONOR'S RECOMMENDATION IN THAT REGARD, RECOGNIZING THAT THE COURT'S RECOMMENDATION IS JUST THAT.

THE COURT: WELL, I DO SO RECOMMEND EITHER CAMP TAFT OR LOMPOC SO HE MAY BE AS CLOSE TO FAMILY AS POSSIBLE, AND THEN THEY WILL MAKE THE CHOICES THAT THEY MAKE.

IS THAT EVERYTHING UNTIL WE GET TO THE BAIL PENDING A APPEAL ISSUE?

THE CLERK: DO WE HAVE A SURRENDER DATE?

THE COURT: VOLUNTARY SURRENDER IS ORDERED FOR BOTH DEFENDANTS. WHEN WOULD THAT BE?

MR. OSTERHOUDT: SUBJECT TO THE COURT'S RULING ON THE BAIL PENDING APPEAL MOTION, WE WOULD ASK A DATE IN DECEMBER.

THE COURT: TRACY, WHAT WOULD IT NORMALLY BE?

THE CLERK: I BELIEVE IT'S --

MR. OSTERHOUDT: BEFORE THE 20TH IF POSSIBLE.

THE CLERK: I'M NOT SURE HOW LONG BOP IS TAKING TO DESIGNATE.

MR. MABIE: IT WOULD TAKE UP TO SIX WEEKS.

THE COURT: DO YOU WANT TO SAY THE END OF NOVEMBER?

MS. TEWKSBURY: THAT'S FINE WITH US, YOUR HONOR, SUBJECT TO BOP AND THEIR AVAILABILITY, OF COURSE.

THE CLERK: WE'LL SAY NOVEMBER 30.

THE COURT: IS THAT OKAY?

MR. OSTERHOUDT: YES, YOUR HONOR.

MR. ATTANSIO: THANK YOU, YOUR HONOR.

THE COURT: SO VOLUNTARILY SURRENDER BY NOVEMBER 30TH, 2012.

IN THE EVENT THERE'S BEEN NO DESIGNATION, OR IF THERE'S A HANGUP ON DESIGNATION, PLEASE LET THE COURT KNOW AND WE CAN TALK ABOUT WHETHER WE NEED TO ADJUST THAT DATE.

MR. OSTERHOUDT: THANK YOU.

THE COURT: OKAY.

OKAY. THE LAST MATTER ON MY AGENDA IS THE DEFENDANTS HAVE ALL REQUESTED A STAY AND/OR BAIL PENDING APPEAL, AND I'M INCLINED TO DENY ALL OF THOSE REQUESTS.

WITH RESPECT TO AUO, TO STAY THE FINE ON APPEAL IT MUST SHOW THE LIKELIHOOD OF SUCCESS ON APPEAL, IRREPARABLE INJURY ABSENT A STAY; THAT THE STAY WOULD NOT INJURE OTHER PARTIES IN THE PROCEEDING, AND THE PUBLIC INTEREST SUPPORTS THE STAY. AND I DON'T FIND EITHER LIKELY SUCCESS ON THE MERITS OR IRREPARABLE INJURY OR PUBLIC INTEREST. I THINK THE FACTOR THREE IS NEUTRAL.

WITH RESPECT TO MR. CHEN AND KUMA, THEIR REQUESTS TO STAY THE SENTENCE REQUIRE THAT THEY SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT IS NOT A FLIGHT RISK, SHOW THAT THE APPEAL IS NOT FOR DELAY, SHOW THERE'S A SUBSTANTIAL QUESTION OF LAW OR FACT, AND SHOW IF THE SUBSTANTIAL QUESTION IS ANSWERED IN THEIR FAVOR, THEY WOULD BE ACQUITTED OR ENTITLED TO A NEW TRIAL. I DON'T FIND ANY OF THOSE THINGS TO BE TRUE EITHER.

WE'VE DISCUSSED, I THINK AT LENGTH, THE ISSUE OF EXTRADITION FROM TAIWAN.

I WILL SAY I FIND BOTH DEFENDANTS HAVE BEEN COOPERATIVE WITH THE COURT AND RESPONSIBLE WITH THE COURT AND HAVE COME TO COURT WHEN THEY WERE ORDERED TO COME TO COURT AND HAVE SHOWN RELATIVELY LITTLE INCLINATION TO BE A FLIGHT RISK. SO IT'S NOT THAT THEY AS PERSONS ARE IRRESPONSIBLE.

THE FACT REMAINS, HOWEVER, GIVEN THE FACT THAT THERE IS NO EXTRADITION TREATY TO TAIWAN, THAT THERE IS AN ISSUE OF ATTENDANCE THAT IS MUCH MORE COMPLICATED HERE THAN IN SOME OTHER CASES.

AND I DON'T FIND ANY OF THE OTHER FACTORS THAT WOULD WARRANT IMPOSITION OF A STAY, SO THAT'S MY VIEW. I'LL BE HAPPY TO HEAR FROM YOU.

MR. ATTANSIO: WITHOUT BELABORING THE POINT, YOUR HONOR, BUT I HAVE TO COME BACK TO THE POST-CONVICTION TRIP THAT MR. CHEN TOOK, AND I HATE TO BE IN A POSITION TO ARGUE FROM IT AS THOUGH IT'S SOMETHING WE ARE TAKING ADVANTAGE OF, BUT IT'S A FACT.

AFTER THE CONVICTION, AFTER WE ALL KNEW THAT THE GOVERNMENT MIGHT ASK FOR AN EXTREMELY LONG SENTENCE AND THAT, FRANKLY, THAT THE GUIDELINES MIGHT COME OUT WITH AN EXTREMELY LONG SENTENCE, MR. CHEN WAS PERMITTED TO GO HOME, PERMITTED TO HAVE HIS PASSPORT.

SO IF THE COURT'S RULING IS THAT THERE REMAINS A RISK

OF FLIGHT, I WOULD RESPECTFULLY POINT OUT THAT THE HISTORY OF TRIPS WITH HIS PASSPORT, BOTH DOMESTICALLY AND INTERNATIONALLY, DON'T ALLOW FOR THAT CONCLUSION.

I JUST THINK THAT THIS IS AN EXTRAORDINARY CASE. IT'S BEEN AN EXTRAORDINARY CASE BECAUSE THEY CAME HERE IN THE FIRST PLACE. IT'S BEEN AN EXTRAORDINARY CASE BECAUSE OF THE DISCRETION THE COURT HAS EXERCISED TO ALLOW THEM TO TRAVEL, FRANKLY -- I'M SPEAKING HERE FOR MR. CHEN -- HIS CONTINUAL COMING BACK.

HE WAS THE FIRST ONE ALLOWED TO TRAVEL. I STOOD RIGHT HERE, YOUR HONOR -- AND MR. CHEN WAS RIGHT HERE. AND YOUR HONOR WAS VERY, VERY DIRECT, AS THE COURT SHOULD HAVE BEEN, THAT HE SHOULD NOT LET DOWN HIS DAUGHTERS, WHO HAD POSTED AN EXTRAORDINARY AMOUNT OF -- WHO HAD PLEDGED AN EXTRAORDINARY AMOUNT OF SECURITY, HE SHOULDN'T LET DOWN HIS FAMILY, HE SHOULDN'T LET DOWN THE COURT; THAT IF HE DID THAT, YOUR HONORAND THE GOVERNMENT WOULD TAKE THAT MONEY FROM HIS DAUGHTERS.

WE ARE STILL THERE. NOT ONLY ARE WE THERE, WE ARE BEYOND THERE BECAUSE HE'S TRAVELED SINCE AND HE'S LIVED UP TO EVERY PROMISE HE'S GIVEN TO THIS COURT.

TO SAY -- I THINK YOUR HONOR IS RIGHT IN A SENSE, WE ARE PAST WHETHER THERE'S AN EXTRADITION TREATY OR NOT -- JUST BY THE WAY THEY'VE ACTED, THE WAY HE'S CONDUCTED HIMSELF, SO I AGREE WITH YOUR HONOR, THAT SHOULD NOT BE A CONSIDERATION.

WE'RE WAY PAST THAT. HE WAS CONVICTED, AND HE WENT HOME, AND THAT WAS EXTRAORDINARILY MONUMENTAL TO HIM AND HIS FAMILY.

THERE ARE REAL ISSUES HERE. YOUR HONOR HAS MADE COMMENTS ALONG THE WAY BECAUSE, FRANKLY, SOME OF THE ISSUES HAVE BEEN SO HOTLY DEBATED, AND YOUR HONOR HAS MADE AT LEAST THREE COMMENTS, WHICH WE POINT OUT IN OUR PAPERS ABOUT THE NOVEL ISSUES AND ABOUT HOW WE'RE IN UNCHARTED TERRITORY.

SO, COMBINED WE HAVE A MAN WHO CANNOT POSSIBLY BE CONSIDERED A FLIGHT RISK GIVEN HIS CONDUCT. WE HAVE ISSUES OF SUBSTANTIAL -- NOVEL ISSUES THAT ARE SUBSTANTIAL AND SIGNIFICANT UNDER ANTITRUST LAW, GIVEN THE FOREIGN CONDUCT, AND ALL THE OTHER ISSUES WHICH I WON'T GO INTO, ALL OF THOSE THINGS MR. JENKINS AND MR. RIORDAN HAVE SO ABLY ARGUED FOR OVER A YEAR NOW, I WILL NOT TRY TO REARGUE NOW, BUT THEY'RE THERE, WHICH I SUGGEST THE NINTH CIRCUIT IS GOING TO BE KEENLY INTERESTED IN THEM BECAUSE THEY'RE NEW.

SO WITH ALL OF THOSE THINGS, YOUR HONOR, WHILE THE NINTH CIRCUIT DELIBERATES THOSE ISSUES THAT YOUR HONOR HAS GRAPPLED WITH -- AND THE DISTRICT COURT ALWAYS HAS TO GRAPPLE WITH THEM FIRST -- WHILE THE NINTH CIRCUIT WRESTLES WITH THEM AND GRADES ALL OF OUR PAPERS, HE SHOULDN'T HAVE TO BE IN JAIL. THAT'S ALL. HE DESERVES NOT TO BE IN JAIL WHILE THAT HAPPENS. HE WILL NOT LET YOUR HONOR DOWN. WE WILL SEE WHAT THE NINTH CIRCUIT HAS TO SAY TO ALL OF US BEFORE HE HAS TO GO INTO JAIL. IT'S JUST THE RIGHT THING.

I SUBMIT.

THE COURT: ALL RIGHT. THANK YOU.

MR. HANDMAN: GOOD MORNING, YOUR HONOR. I WANT TO ECHO WHAT MR. ATTANASIO SAID BECAUSE IT APPLIES AS WELL TO KUMA.

HE'S OBVIOUSLY BEEN SOMEONE WHO'S FORFEITED HIS PASSPORT. HE WAS, WITH THE COURT'S PERMISSION, GRANTED LEAVE TO TRAVEL INTERNATIONALLY BACK TO TAIWAN ON THREE OCCASIONS, THEN TO TRAVEL INTERNATIONALLY AGAIN. HE HAS ALWAYS BEEN ENTIRELY CAREFUL IN COMPLYING WITH THOSE REQUIREMENTS.

AND I THINK AN IMPORTANT POINT IS THAT AFTER THIS CONVICTION UNDER THE STATUTE, UNDER 3143(A), THE REQUIREMENT AT THAT POINT WAS THAT HE BE REMANDED TO CUSTODY UNLESS HE COULD SHOW BY THE SAME STANDARD WE HAVE HERE TODAY, CLEAR AND CONVINCING EVIDENCE, THAT HE WOULD NOT BE A FLIGHT RISK.

THE GOVERNMENT AT THAT POINT DIDN'T ASK TO REMAND HIM TO CUSTODY. YOUR HONOR DID NOT CONDUCT THAT INQUIRY AND SUGGEST HE WOULD PRESENT A FLIGHT RISK AFTER CONVICTION. I THINK THAT STILL REMAINS TODAY. THE STANDARD IS EXACTLY THE SAME, AND THE CIRCUMSTANCES ARE VIRTUALLY THE SAME. THE ONLY DIFFERENCE IS THAT NOW SENTENCE HAS BEEN IMPOSED. BUT, IF ANYTHING, THE SENTENCE WAS A LOWER RANGE THAN WHAT THE GOVERNMENT WAS SEEKING WHEN MR. HSUING HAD EVEN PERHAPS MORE OF A PALPABLE CONCERN AND INSTINCT TO FLEE. I DON'T THINK YOU HAVE A RECORD TO FIND HE DOES PRESENT A FLIGHT RISK.

I THINK IT'S TELLING THAT THE GOVERNMENT IN THEIR OPPOSITION THAT WAS JUST FILED DOESN'T CONTEST THE POINT. THERE'S A FOOTNOTE THAT SEEMS TO RESERVE ON THE QUESTION, BUT THEY DO NOT AFFIRMATIVELY ARGUE. SO IT WOULD BE A FINDING ON YOUR OWN THAT I DO THINK CONTRADICTS PREVIOUS FINDINGS YOUR HONOR HAS MADE AND CERTAINLY THE TACIT FINDING THAT YOUR HONOR MADE AT THE CONVICTION.

ON THE MERITS QUESTION, I THINK AS MR. ATTANASIO SAID, THE STANDARD IS SIMPLY IS THERE A SUBSTANTIAL QUESTION. AND THE NINTH CIRCUIT IN THE HANDY CASE SAYS WHAT THAT MEANS IS: IS IT FAIRLY DEBATABLE?

I REMEMBER MY FIRST APPEARANCE BEFORE YOUR HONOR BACK IN MAY DISCUSSING A FAIRLY DEBATABLE QUESTION. I SAID, IN RESPONSE TO ONE OF YOUR QUESTIONS, THERE WAS, SADLY, NO CONTROLLING AUTHORITY. YOUR RESPONSE WAS ESSENTIALLY, WELCOME TO THE CLUB. THIS CASE HAS BEEN, IN YOUR WORDS, CHOCK FULL OF QUESTIONS WHERE THERE HAVE BEEN NO CONTROLLING AUTHORITIES. I THINK THAT'S RIGHT.

THESE ARE VERY NOVEL QUESTIONS. THE GOVERNMENT HAS EMPHASIZED THE UNPRECEDENTED NATURE OF THIS PROSECUTION. THE QUESTIONS SURROUNDING THE VERY ESSENCE OF WHETHER THIS IS SOMETHING GOVERNED BY A PER SE THEORY OR WHETHER IT'S GOVERNED BY RULE OF REASON IS CLEARLY A DEBATABLE QUESTION.

THE METRO INDUSTRIES CASE CERTAINLY SPEAKS TO THOSE ISSUES SQUARELY, AND I KNOW YOUR HONOR HAS RULED AGAINST US ON

THAT POINT, BUT IT IS A CASE THAT SAYS THAT ON FOREIGN CONDUCT, THESE SORTS OF ANTITRUST VIOLATIONS ARE GOVERNED BY A RULE OF REASON WHEN THERE'S FOREIGN CONDUCT INVOLVED.

THAT'S SOMETHING, OF COURSE, FOR THE COURT OF APPEALS TO RESOLVE. BUT IS THAT A FAIRLY DEBATABLE QUESTION? YES. AND THE NINTH CIRCUIT HAS SAID WE DON'T HAVE TO SHOW THAT WE ARE LIKELY TO PREVAIL. WE DON'T NEED YOUR HONOR TO PERFORM THE SORT OF METAPHYSICAL INQUIRY OF GUESSING WHETHER YOU ARE ACTUALLY INCORRECT. ALL YOU NEED TO RECOGNIZE IS THAT IT IS CLOSE CALL, AND IT'S A CLOSE CALL AS YOUR HONOR HAS RECOGNIZED.

I THINK SOMETHING YOUR HONOR HAS SAID TODAY UNDERSCORES THE IMPORTANCE OF THAT DISTINCTION HERE.

THESE DEFENDANTS, AS YOUR HONOR SAID, WERE CONVICTED OF SOMETHING THAT YOU THAT SAID THE EVIDENCE SHOWS ON A PER SE BASIS A CLEAR PRICE-FIXING CONSPIRACY. BUT YOUR HONOR ALSO RECOGNIZED THAT THEY MADE SOME POOR JUDGMENTS BASED ON CONCERNS FOR THEIR COMPANY, CONCERNS FOR A FLEDGLING INDUSTRY, THE SORTS OF ISSUES THAT ACTUALLY GET TO WHAT A RULE OF REASONABLENESS WOULD EVALUATE, AND THESE DEFENDANTS COULD VERY WELL HAVE, READING THE METRO INDUSTRIES DECISION, THAT RULE OF REASONABLENESS IS THE ANSWER HERE AND DOES CONTROL THAT CONDUCT.

SO I THINK WHAT YOUR HONOR HAS RECOGNIZED CONFIRMS THE IMPORTANCE OF RECOGNIZING HOW CLOSE THESE QUESTIONS ARE AND HOW THESE DEFENDANTS COULD HAVE, IN GOOD FAITH, COME TO THE

UNITED STATES FROM A COUNTRY WITH NO EXTRADITION TREATY AND VOLUNTARILY SURRENDER THEMSELVES TO THIS COURT'S JUSTICE SYSTEM.

I THINK ON THOSE FACTORS, WE THINK THERE'S CLEAR AND CONVINCING EVIDENCE -- THE GOVERNMENT HASN'T CONTESTED FLIGHT RISK, AND WE DON'T THINK THEY'VE PROVIDED ANY MEANINGFUL REBUTTAL ON THE SUBSTANTIAL QUESTIONS. THEIR ONLY POINTS ARE TWO; THIS COURT HAS ALREADY RESOLVED THOSE QUESTIONS, BUT, OF COURSE, WE'RE APPEALING. IF WE HAD WON, THEN THAT WOULD BE TRUE. THAT CAN'T BE THE ANSWER BECAUSE NO ONE WOULD GET A BOND IN THAT CASE.

AND THE SECOND ISSUE THEY SAY IS THESE ISSUES HAVE BEEN VENTILATED OVER AND OVER AGAIN BY YOUR HONOR AND BY COUNSEL. THEY'RE EXACTLY RIGHT. THE REASON THEY WERE VENTILATED SO AGGRESSIVELY AND THOROUGHLY IS BECAUSE THERE ARE NO EASY ANSWERS. THEY DON'T ADMIT OF THOSE QUESTIONS. THE REASON THIS COURT HAD TO STRUGGLE AND COUNSEL HAD TO STRUGGLE IS THESE ARE TOUGH ISSUES. THEY AREN'T THE USUAL THING WHERE YOU SIMPLY LOOK AT THE RULE AND SEE WHAT THE ANSWER IS OR THE BINDING PRECEDENT. THERE HAVE BEEN VERY FEW BINDING PRECEDENTS FOR THE COURT TO APPLY.

SO I THINK THE GOVERNMENT'S RESPONSE ONLY CONFIRMS WHY THIS IS A CASE THAT DOES MERIT A BAIL PENDING APPEAL.

THANK YOU, YOUR HONOR.

THE COURT: MR. SNYDER.

MR. SNYDER: YOUR HONOR, THIS CASE HAS UNDOUBTEDLY PRODUCED NOVEL ISSUES OF FIRST IMPRESSION. CERTAINLY, THE OVERCHARGE CASE AND ISSUES RELATED TO THAT ARE THE FIRST TIME THIS HAS EVER BEEN LITIGATED IN A CRIMINAL ANTITRUST CASE.

THE PROBLEM WITH THE INDIVIDUAL DEFENDANTS' POSITION IS THAT THE ISSUES THEY CAN RELY ON FOR THEIR MOTION TO STAY ARE NOT NOVEL. THEY DO NOT RAISE ISSUES OF FIRST IMPRESSION.

THE FACT OF THE MATTER IS THAT THE EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT TO FOREIGN CONDUCT HAS BEEN UNDISPUTED FOR A VERY LONG TIME. AFTER HARTFORD FIRE, NIPPON PAPER, COURTS HAVE REPEATEDLY APPLIED THE SHERMAN ACT TO CONDUCT THAT IS WHOLLY FOREIGN.

THE THING THAT'S IMPORTANT TO REMEMBER HERE IS THIS IS NOT A CASE THAT'S ABOUT WHOLLY FOREIGN CONDUCT. THIS CASE DEALT VERY MUCH WITH CONDUCT -- CONSPIRATORIAL CONDUCT THAT TOOK PLACE HERE IN THE UNITED STATES.

THREE WITNESSES SERVED NO PURPOSE OTHER THAN TO FILL OUT THE U.S. ASPECT OF THIS CASE. MICHAEL WONG TALKED ALL ABOUT AUOA'S CONDUCT HERE IN THE UNITED STATES THAT WAS CONSPIRATORIAL IN NATURE.

TIM TIERNEY, PIYUSH BHARGAVA, OUR VICTIM WITNESSES, TALKED ABOUT HOW THE AFFECTED PRICE NEGOTIATIONS FROM THIS CONSPIRACY TOOK PLACE HERE IN THE UNITED STATES. PIYUSH BHARGAVA ALSO TALKED ABOUT HOW THE DEFENDANTS WOULD VISIT THEM IN AUSTIN. THOSE TRIPS BY THESE DEFENDANTS WERE ACTS IN

FURTHERANCE OF THE CONSPIRACY THAT OCCURRED HERE IN THE UNITED STATES.

SO UNDER EITHER SCENARIO, EITHER THE NOVELTY OF THE EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT OR THE ISSUE AS TO WHETHER THIS IS A FULLY FOREIGN APPLICATION OF -- FULLY FOREIGN APPLICATION OF THE SHERMAN ACT, NEITHER OF THOSE -- THE FIRST ISSUE IS NOT NOVEL, AND THE SECOND ISSUE HAS BEEN DISPROVEN BY THE EVIDENCE IN THIS CASE.

SECOND, WITH RESPECT TO METRO INDUSTRIES, THAT IS NOT A FAIRLY DEBATABLE POINT. NO COURT -- AND IT'S NOT JUST YOUR HONOR THAT'S CONSIDERED THAT CASE -- NO COURT THAT'S EVER BEEN ASKED TO CONSIDER THAT CASE IN THIS CONTEXT HAS EVER APPLIED IT. THAT IS NOT AN ISSUE I THINK THAT RAISES A SUBSTANTIAL QUESTION THAT WOULD JUSTIFY A STAY OF THEIR SENTENCE.

FINALLY, THE LAST TWO ISSUES REALLY ARE SUFFICIENCY OF EVIDENCE. YOUR HONOR HEARD THE TRIAL RECORD. THE JURY CONVICTED THEM BEYOND A REASONABLE DOUBT.

WITH RESPECT TO VENUE, MS. TEWKSBURY STOOD UP HERE AT THE RULE 29 HEARING AND RECITED, I BELIEVE, HER TOP 24 PIECES OF EVIDENCE IN THE RECORD SUPPORTING VENUE. ONLY ONE OF THOSE IS NECESSARY TO ESTABLISH VENUE. IT'S NOT A DEBATABLE POINT THAT THERE WAS A SUFFICIENCY OF THE VENUE EVIDENCE.

FINALLY, WITH RESPECT TO FTAA COMMERCE, THERE IS ALSO EVIDENCE IN THE RECORD THAT SUPPORTS THAT, AND THE DEFENDANTS REQUESTED AND RECEIVED A JURY INSTRUCTION MAKING THAT AN

ELEMENT OF THE CASE. THE JURY, CONSIDERING THAT INSTRUCTION, FOUND THEM GUILTY BEYOND A REASONABLE DOUBT. I THINK IT'S NOT A DEBATABLE POINT THAT THERE IS A SUFFICIENCY OF EVIDENCE IN THE RECORD ON THE BASIS OF DR. LEFFLER'S TESTIMONY AND OTHER EVIDENCE THAT WAS SUBMITTED THAT WILL SHOW THAT THERE WAS A SUFFICIENT EVIDENTIARY RECORD FOR THAT FINDING.

THANK YOU.

THE COURT: THANK YOU.

MR. RIORDAN: YOUR HONOR, I LEFT THE ISSUE OF BAIL ON APPEAL TO THE INDIVIDUAL DEFENDANTS BECAUSE, NEEDLESS TO SAY, THEIR INTERESTS ARE PARAMOUNT. I JUST WANTED TO -- THE COURT IS GOING TO DENY OUR REQUEST FOR A STAY. WE'VE MADE IT. I JUST WANTED TO ADD TWO THINGS TO THE RECORD.

ONE, OUR PROPOSAL WAS TO PAY, ESSENTIALLY COMMONLY IN BAIL CASES, TEN PERCENT OF THE $500 MILLION TO THE COURT AS SECURITY AND HAVE THE REMAINDER OF THE FINE STAYED.

I DO WANT TO POINT OUT ONE THING. THE COURT IN DISCUSSING AUO SAID WE WERE REQUIRED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS, AND --

THE COURT: ON APPEAL. THAT'S WHAT I SAID. AM I WRONG ABOUT THAT?

MR. RIORDAN: THAT IS THE PHRASE THAT THE GOVERNMENT USES. AT PAGE 1 OF ITS BRIEF, IT CITES ONE CASE FOR IT. LEIVA-PEREZ VERSUS HOLDER, 640 FED.3D. 962. WHAT IT DOESN'T DO IS TELL YOU THAT THAT CASE STANDS FOR THE OPPOSITE OF THE

PROPOSITION THAT IT'S STATED.

IN THAT CASE, THE COURT SAID THERE HAVE BEEN WORDS USED IN THE PRELIMINARY INJUNCTION CONTEXT OF LIKELIHOOD OF SUCCESS, BUT LET US BE CLEAR, THAT DOES NOT APPLY IN THE APPELLATE CONTEXT FOR A STAY. WE FIND -- I'M QUOTING.

"WE FIND ADDITIONAL EVIDENCE THAT THIS STAY FACTOR DOES NOT REQUIRE THE MOVING PARTY TO SHOW THAT THEIR ULTIMATE SUCCESS IS PROBABLE."

OKAY? AND THEN IT GOES ON TO SAY WHY. IT SAYS, ALL YOU HAVE TO DO IS SHOW, QUOTE: "SERIOUS QUESTIONS GOING TO THE MERITS," NOT A LIKELIHOOD OF SUCCESS ON THE MERITS, BUT THE NEXT TWO SENTENCES MERIT QUOTATION.

"SUCH A RULE MAKES GOOD SENSE. A MORE STRINGENT REQUIREMENT WOULD EITHER, IN ESSENCE, PUT EVERY CASE IN WHICH A STAY IS REQUESTED ON AN EXPEDITED SCHEDULE WITH THE PARTIES REQUIRED TO BRIEF THE MERITS OF THE CASE IN DEPTH FOR STAY PURPOSES, OR WOULD HAVE THE COURT ATTEMPTING TO PREDICT WITH ACCURACY THE RESOLUTION OF OFTEN THORNY LEGAL ISSUES WITHOUT ADEQUATE BRIEFING AND ARGUMENT. SUCH PREADJUDICATION WOULD DEFEAT THE PURPOSE OF THE STAY, WHICH IS TO GIVE THE REVIEWING COURT THE TIME TO ACT

RESPONSIBILITY RATHER THAN DOLING OUT JUSTICE ON THE FLY."

SO ALL THAT IS REQUIRED HERE IS A SERIOUS QUESTION --

THE COURT: YOU MIGHT BE RIGHT, AND I'LL GET TO THAT IN A MINUTE. OF COURSE, WHAT THEY WERE JUST TALKING ABOUT IS IF YOU ARE TALKING ABOUT A PRELIMINARY INJUNCTION AND YOU HAVEN'T EVEN GOT THE REST OF IN EVIDENCE THE CASE AT THE TRIAL LEVEL, RIGHT? IS THAT WHAT YOU'RE SAYING?

MR. RIORDAN: THIS IS A CASE IN WHICH THE GOVERNMENT, AS IT DOES HERE, ATTEMPTED TO SAY THAT THE PRELIMINARY INJUNCTION STANDARD APPLIES TO A CASE ON APPEAL, AND THIS IS NINTH CIRCUIT SAYING, NO, THE PRELIMINARY INJUNCTION STANDARD DOESN'T APPLY TO A REQUEST ON APPEAL; WHAT IT APPLIES IS THE SERIOUS QUESTION TEST.

THE COURT: FINE. I FIND THERE ISN'T A SERIOUS QUESTION. BUT I APPRECIATE CORRECTING ME ON THE STANDARD.

MR. RIORDAN: THE COURT DOESN'T BELIEVE THE METRO ISSUE WAS A SERIOUS QUESTION, WHEN JUDGE ALDER SAID IT'S THE PREVAILING RULE IN THE NINTH CIRCUIT? THE COURT MAY BE RIGHT, BUT THE NINTH CIRCUIT HAS NEVER DEVIATED FROM THAT STANDARD. I SUBMIT IT IS A VERY SERIOUS QUESTION.

THE COURT: THANK YOU, COUNSEL. WAS THAT WRONG? WAS THAT THE WRONG STANDARD TO APPLY?

MR. SNYDER: I DON'T BELIEVE SO, YOUR HONOR, BUT WE CAN MAKE IT EASY FOR YOU. THEY UNDOUBTEDLY HAVE THE BURDEN OF

PROVING IRREPARABLE HARM, WHICH YOU ALREADY FOUND THEY HAVEN'T PROVEN, AND IT WOULD BE IN THE PUBLIC INTEREST TO ALLOW A STAY, WHICH YOU ALSO FOUND WOULD NOT BE IN THE PUBLIC'S INTEREST -- YOU HAVE FOUND A STAY WOULD NOT BE IN THE PUBLIC'S INTEREST.

SO, ON THOSE TWO FACTORS ALONE, YOU CAN DENY THEIR MOTION FOR STAY.

THE COURT: OKAY. THANK YOU. ALL FOUR MOTIONS ARE DENIED.

ANYTHING ELSE FOR TODAY? ALL RIGHT. THANK YOU ALL VERY MUCH.

(PROCEEDINGS ADJOURNED.)

CERTIFICATE OF REPORTER

I, JOAN MARIE COLUMBINI, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN CR 09-0110 SI, UNITED STATES VERSUS AU OPTRONICS, ET AL., WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

/S/ JOAN MARIE COLUMBINI, CSR 5435, RPR

FRIDAY, SEPTEMBER 21, 2012

AO 245E (Rev. 12/03) Judgment in a Criminal Case for Organizational Defendants
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of California

UNITED STATES OF AMERICA
V.

AU OPTRONICS CORPORATION

JUDGMENT IN A CRIMINAL CASE
(For Organizational Defendants)

CASE NUMBER: CR 09-00110-10 SI

Dennis Riordan, Retained
Defendant Organization's Attorney

THE DEFENDANT ORGANIZATION:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) One after a plea of not guilty.

The organizational defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
15 U.S.C. § 1	Price Fixing	December 2006	One

The defendant organization is sentenced as provided in pages 2 5 of this judgment.

☐ The defendant organization has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant organization must notify the United States attorney for this district within 30 days of any change of name, principal business address, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant organization must notify the court and United States attorney of material changes in economic circumstances.

Defendant Organization's
Federal Employer I.D. No.: Not available

Defendant Organization's Principal Business Address:

No. 1, Li-Hsin Road 2, Hsinchu Science Park
Hsinchu, Taiwan
Republic of China

Defendant Organization's Mailing Address:

No. 1, Li-Hsin Road 2, Hsinchu Science Park
Hsinchu, Taiwan
Republic of China

September 20, 2012
Date of Imposition of Judgment

Signature of Judge

Honorable Susan Illston, U.S. District Judge
Name and Title of Judge

10/1/12
Date

DEFENDANT ORGANIZATION: AU Optronics Corporation
CASE NUMBER: CR 09-00110-10 SI

PROBATION

The defendant organization is hereby sentenced to probation for a term of :

Three (3) years

The defendant organization shall not commit another federal, state or local crime.

If this judgment imposes a fine or a restitution obligation, it is a condition of probation that the defendant organization pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant organization must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) within thirty days from the date of this judgment, the defendant organization shall designate an official of the organization to act as the organizations's representative and to be the primary contact with the probation officer;

2) the defendant organization shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

3) the defendant organization shall notify the probation officer ten days prior to any change in principal business or mailing address;

4) the defendant organization shall permit a probation officer to visit the organization at any of its operating business sites;

5) the defendant organization shall notify the probation officer within seventy-two hours of any criminal prosecution, major civil litigation, or administrative proceeding against the organization;

6) the defendant organization shall not dissolve, change its name, or change the name under which it does business unless this judgment and all criminal monetary penalties imposed by this court are either fully satisfied or are equally enforceable against the defendant's successors or assignees; and

7) the defendant organization shall not waste, nor without permission of the probation officer, sell, assign, or transfer its assets.

DEFENDANT ORGANIZATION: AU Optronics Corporation
CASE NUMBER: CR 09-00110-10 SI

SPECIAL CONDITIONS OF SUPERVISION

1) AU Optronics Corporation shall develop, adopt, and implement an effective compliance and ethics program. Such a program shall establish standards and procedures to prevent and detect criminal conduct. AU Optronics Corporation shall notify its employees and shareholders of its conviction and its effective compliance and ethics program. All aspects of the program shall be reported to the probation officer as directed and quarterly reports detailing the organization's progress shall be submitted to ensure compliance.

2) AU Optronics Corporation shall, at its own expense, acknowledge the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses, in three major trade publications in both the United States and Taiwan.

3) AUO/AUOA are required to hire, at their expense, an independent monitor within sixty (60) calendar days of the date of sentencing, to monitor AUO/AUOA's antitrust compliance program for the period of their probation supervision. Within thirty (30) calendar days after the date of sentencing, AUO/AUOA shall recommend to the Probation Office and the United States Department of Justice, Antitrust Division, San Francisco Field Office a pool of three qualified monitor candidates and provide to the Probation Office and the Antitrust Division a description of each candidate's qualifications and credentials. After consultation with the Antitrust Division, the Probation Office, in its sole discretion, shall either select one of the candidates nominated by AUO/AUOA to serve as the monitor, select an alternative-qualified monitor of its own choosing, or instruct AUO/AUOA to propose three additional candidates for selection pursuant to the process set forth above. The monitor shall not be an employee or agent of AUO/AUOA and shall not hold any interest in, or have any relationship with, AUO/AUOA or their directors, officers, employees, agents, or business partners. The monitor shall provide quarterly reports to the probation office regarding antitrust compliance.

DEFENDANT ORGANIZATION: AU Optronics Corporation
CASE NUMBER: CR 09-00110-10 SI

CRIMINAL MONETARY PENALTIES

The defendant organization must pay the following total criminal monetary penalties under the schedule of payments on Sheet 4.

	Assessment	Fine	Restitution
TOTALS	$ 400	$ 500,000,000	$ 0

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant organization shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant organization makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ _____	$ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☒ The defendant organization shall pay interest on restitution or a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 4 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant organization does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

DEFENDANT ORGANIZATION: AU Optronics Corporation
CASE NUMBER: CR 09-00110-10 SI

SCHEDULE OF PAYMENTS

Having assessed the organization's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 500,000,400 due immediately, balance due

☐ not later than _____ , or
☒ in accordance with ☐ C or ☒ D below; or

B ☐ Payment to begin immediately (may be combined with ☐ C or ☐ D below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☒ Special instructions regarding the payment of criminal monetary penalties:

The fine is payable as follows: $125 million within 120 days of sentencing, and $125 million per year for the next three years. Interest is not waived for the fine.

All criminal monetary penalties are made to the clerk of the court.

The defendant organization shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant organization shall pay the cost of prosecution.

☐ The defendant organization shall pay the following court cost(s):

☐ The defendant organization shall forfeit the defendant organization's interest in the following property to the United States:

United States District Court
Northern District of California

UNITED STATES OF AMERICA
v.
HUI HSIUNG,
a/k/a "Kuma"

JUDGMENT IN A CRIMINAL CASE

USDC Case Number: CR-09-00110-008 SI
BOP Case Number: DCAN309CR000110-008
USM Number: Pending
Defendant's Attorney: Brian Berson (Retained)

THE DEFENDANT:

[ ] pleaded guilty to count(s): __.
[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.
[x] was found guilty on count One of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
15 U.S.C. § 1	Price Fixing	December 1, 2006	One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ___.

[ ] Count(s) ___ (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

September 20, 2012
Date of Imposition of Judgment

Signature of Judicial Officer

Honorable Susan Illston, U.S. District Judge
Name & Title of Judicial Officer

10/1/12
Date

DEFENDANT: HUI HSIUNG
CASE NUMBER: CR-09-00110-008 SI

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of Thirty-Six (36) months with no supervision to follow.

[x] The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant be incarcerated at Taft CI to facilitate visitation with his family.

[ ] The defendant is remanded to the custody of the United States Marshal. The appearance bond is hereby exonerated.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ [] am [] pm on ___.
[ ] as notified by the United States Marshal.

The appearance bond shall be deemed exonerated upon the surrender of the defendant.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[x] before 2:00 pm on November 30, 2012 .
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

The appearance bond shall be deemed exonerated upon the surrender of the defendant.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy United States Marshal

DEFENDANT: HUI HSIUNG
CASE NUMBER: CR-09-00110-008 SI

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

		Assessment	Fine
Restitution			
Totals:	$	$100.00	$ 200,000.00

[ ] The determination of restitution is deferred until _. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below. The defendant shall make all payments directly to the U.S. District Court Clerk's Office who will disburse payments to the payee.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$ _	$_	

[ ] Restitution amount ordered pursuant to plea agreement $ _

[x] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine [ ] restitution.

[ ] the interest requirement for the [ ] fine [ ] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: HUI HSIUNG
CASE NUMBER: CR-09-00110-008 SI

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [x] Lump sum payment of $200,100 due immediately, balance due

[x] not later than 120 days after sentencing, or

[x] in accordance with ( ) C, ( ) D, ( ) E, ( ) F (x) G or ( ) H below; or

B [ ] Payment to begin immediately (may be combined with ( ) C, ( ) D, or ( ) F below); or

C [ ] Payment in equal (e.g. weekly, monthly, quarterly) installments of $ _ over a period of __ (e.g., months or years), to commence _ (e.g., 30 or 60 days) after the date of this judgment; or

D [] Payment in equal monthly installments of $ 1,000 over a period of three years, to commence 60 days after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e,g, 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

G. [x] In Custody special instructions:

Payment of criminal monetary penalties is due during imprisonment at the rate of not less than $25.00 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102

H. [ ] Out of Custody special instructions:

It is further ordered that the defendant shall pay to the United States a special assessment of $ and a fine of $ which shall be due immediately. If incarcerated, payment of criminal monetary payment is due during imprisonment and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and co-defendant Names	Case Numbers (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee (if appropriate)

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: HUI HSIUNG
CASE NUMBER: CR-09-00110-008 SI

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

[ ] The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future, **but such future orders do not affect this defendant's responsibility for the full amount of the restitution ordered.**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 1:16-CR-00078
	)	
	)	Filed: August 9, 2016
v.	)	
	)	Violation: 15 U.S.C. § 1
HITACHI AUTOMOTIVE SYSTEMS, LTD.	)	
	)	
	)	Judge: Michael R. Barrett
	)	
Defendant.	)	
	)	

UNITED STATES SENTENCING MEMORANDUM

Hitachi Automotive Systems, Ltd. ("HIAMS" or the "Defendant") is scheduled to appear before this Court for sentencing on February 16, 2017, at 10:00 a.m. The Defendant is charged with violating the Sherman Act, 15 U.S.C. § 1. The United States submits this Sentencing Memorandum to provide the Court with sufficient information that it may meaningfully exercise its sentencing authority under 18 U.S.C. §§ 3553 and 3572.

Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States recommends that the Court sentence the Defendant to pay to the United States a $55.48 million criminal fine, payable in full before the fifteenth day after the date of judgment. Because this recommended fine amount is within the agreed-upon fine range set forth in Paragraph 9 of the Plea Agreement, pursuant to Paragraph 9(b) of the Plea Agreement, the Defendant will not oppose this fine recommendation. The United States also recommends that the Court sentence the Defendant to a term of probation of two (2) years with the conditions enumerated in paragraph 9(d) of the Plea Agreement. Since restitution is not mandatory for violations of 15 U.S.C. § 1, and in light of availability of civil causes of action

pursuant 15 U.S.C. § 15, the United States recommends that the Court not sentence the Defendant to pay restitution. Finally, the Defendant should be sentenced to pay a $400 special assessment. *See* Plea Agreement, ¶ 9, Docket No. 003.

I. BACKGROUND

The Sherman Act makes it illegal for competitors to eliminate competition among themselves by allocating markets, rigging bids, and fixing prices. The subversion and elimination of competition for business, whether done through agreement to divide up business by allocating customers or markets; fix prices charged to customers; or rig bids submitted to customers, typically results in the customer paying more than it should have for the work done or the product supplied. The Defendant has admitted that, through its employees, it conspired with other shock absorbers manufacturers to do these things made illegal by the Sherman Act.

Shock absorbers are part of the suspension system on automobiles. They absorb and dissipate energy to help cushion vehicles on uneven roads leading to improved ride quality and vehicle handling. Shock absorbers are also called dampers.

On August 9, 2016, the United States filed a one-count criminal Information charging the Defendant with participating in a combination and conspiracy to suppress and eliminate competition in the automotive parts industry by agreeing to allocate markets of, rig bids for, and to fix, stabilize, and maintain the prices of shock absorbers sold to Suzuki Motor Corporation and Toyota Motor Corporation, and certain of their subsidiaries (collectively, the "Automobile Manufacturers"), in violation of the Sherman Act, 15 U.S.C. § 1. *See* Docket No. 2.

II. SUMMARY OF THE OFFENSE

During the period charged in the Information, from at least as early as the mid-1990s and continuing until as late as summer 2011 (the "Charging Period"), Defendant and its predecessors in interest, were corporations organized and existing under the laws of Japan with their principal place of business in Tokyo, Japan.[1] During the Charging Period, the Defendant, and certain of its subsidiaries were engaged in the manufacture and sale of shock absorbers to Automobile Manufacturers in the United States and elsewhere for installation in vehicles manufactured and sold in the United States and elsewhere. During the Charging Period, one of the Defendant's subsidiaries was Hitachi Automotive Systems Americas, Inc., which has headquarters in Kentucky, and plants, offices, and facilities in Kentucky, Michigan, Georgia, and California.

During the Charging Period, Defendant and its co-conspirators entered into and engaged in a combination and conspiracy to suppress and eliminate competition in the automotive parts industry by agreeing to allocate markets of, rig bids for, and to fix, stabilize, and maintain the prices of certain shock absorbers sold to Automobile Manufacturers in the United States and elsewhere. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among Defendant and its co-conspirators. In furtherance of the conspiracy, the Defendant, through its managers and employees, engaged in discussions and attended meetings with co-conspirators employed by other manufacturers of shock absorbers.

[1] For purposes of this Memorandum, reference to "HIAMS" and "Defendant" includes conduct engaged in by its predecessors in interest. HIAMS predecessors in interest include Hitachi Automotive Systems Group of Hitachi, Ltd., Tokico, Ltd., and Unisia Automotive, Ltd. Tokico was purchased by Hitachi Automotive Systems Group of Hitachi, Ltd. in 2004. Tokico USA was the predecessor in interest to Hitachi Automotive Systems Americas, Inc. and operated in the United States from the late 1980s until approximately 2004 when it was purchased by Hitachi Automotive Systems Group of Hitachi, Ltd. Hitachi Automotive Systems Group of Hitachi, Ltd. became HIAMS in 2009. HIAMS is a wholly-owned subsidiary of Hitachi, Ltd.

During these discussions and meetings, agreements were reached to allocate markets of, rig bids for, and to fix, stabilize, and maintain the prices of certain shock absorbers sold to Automobile Manufacturers in the United States and elsewhere. After entering into a Plea Agreement with the United States, the Defendant has cooperated in the United States' ongoing investigation.

III. UNITED STATES' FINE METHODOLOGY AND FACTORS TO CONSIDER IN DETERMINING THE SENTENCE

The jointly recommended criminal fine was calculated using sales figures submitted to the United States by the Defendant and the victims of the conspiracy. Based on these sales figures, the United States calculates the volume of commerce under U.S.S.G. § 2R1.1(d) to total approximately $102.74 million. The affected volume of commerce consists of sales of certain shock absorbers in the United States by the Defendant's U.S. subsidiary to Toyota.

A. Sentencing Guidelines Fine Calculation

In determining and imposing sentence the Court must consider the kinds of sentence and sentencing range established by the advisory Sentencing Guidelines, 18 U.S.C. § 3553(a)(4). The Sentencing Guidelines procedure for calculating the Guidelines fine range for a corporation charged with an antitrust offense is set forth below. Organizations, such as the Defendant, are sentenced pursuant to Chapter 8 of the Sentencing Guidelines. In the case of antitrust violations, in addition to the provisions of Chapter 8, special instructions with respect to determining fines for organizations are found in the Antitrust Guideline, U.S.S.G. § 2R1.1.

Under the Sentencing Guidelines, the first step in determining a defendant's fine range is to determine the base fine.[2] The controlling Guideline applicable to the count charged is U.S.S.G. § 2R1.1(d)(1), pursuant to which the base fine is 20% of the approximately $102.74 million in affected commerce, or approximately $20.55 million.

The next step is to determine the culpability score for a defendant. The base culpability score is 5. *See* U.S.S.G. § 8C2.5(a). The Defendant is a corporation with more than 5,000 employees, and the offense involved certain high-level personnel of the Defendant, which adjusts the culpability score upward by 5 points. *See* U.S.S.G. § 8C2.5(b)(1). The Defendant clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, which adjusts the culpability score downward by 1 point. *See* U.S.S.G. § 8C2.5(g)(3). The resulting total culpability score is 9.

The culpability score is then used to determine the minimum and maximum multipliers. A culpability score of 9 corresponds to a minimum multiplier of 1.80 and a maximum multiplier of 3.60. *See* U.S.S.G. § 8C2.6.

Applying the multipliers to the base fine of $20.55 million yields a Guidelines fine range for the Defendant of $36.99 million to $73.98 million. *See* U.S.S.G. § 8C2.7.

B. Statutory Factors to Consider at Sentencing

In addition to the advisory Sentencing Guidelines, the Court must consider the other factors set forth in 18 U.S.C. §§ 3553(a) and 3572 in determining and imposing sentence. The Court's sentence must be sufficient, but not greater than necessary, to

[2] The starting point for determining the base fine is § 8C2.4. It states that the base fine is the greatest of three alternatives: (1) the amount from a table in § 8C2.4(d) corresponding to the offense level; (2) "the pecuniary gain to the organization from the offense"; or (3) "the pecuniary loss from the offense caused by the organization." U.S.S.G. §8C2.4(a). It also provides that "if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied, as appropriate." *Id.* § 8C2.4(b). For antitrust offenses, a special instruction in § 2R1.1(d)(1) directs the Court to use 20 percent of the volume of affected commerce instead of pecuniary loss.

comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). Because the Defendant in this case is a corporation, not all of the statutory factors apply. Below, the factors that are most relevant to the sentencing of this Defendant are highlighted.

1. Relevant Section 3553 Factors

a. The History, Characteristics, and Cooperation of the Defendant (3553(a)(1))

In September 2013, HIAMS was charged with violating the Sherman Act in connection with the manufacture and sale of certain specified auto parts. *See U.S. v. Hitachi Automotive Systems, Ltd.* (*HIAMS I*), Case No. 2:13-CR-20707 (E.D. Mich.)(filed September 26, 2013). HIAMS agreed to plead guilty to this charge and in November 2013, it was sentenced to pay a fine of $195 million. Despite this prior charge, HIAMS is not considered a recidivist under the Guidelines, because the conduct charged in the present case occurred during the same time period as the conduct charged in *HIAMS I* and the conspiracy in the present case ended in 2011, prior to the charges in *HIAMS I*. *See* U.S.S.G. § 8C2.5(c).

Nonetheless, it is troubling that HIAMS did not uncover and report the conduct charged in this case when it was under investigation in the first case. Additionally, *HIAMS I* is not the first or last time companies related to, or subsidiaries of, Hitachi, Ltd., HIAMS' parent company, have been charged with antitrust violations.[3] The United States took these previous convictions into account during plea negotiations in this case, particularly with respect to the recommendation of a fine in the middle of the Guidelines

[3] *See U.S. v. Hitachi Chemical Co., Ltd.*, Case No. 16-CR-00180 (N.D. Cal.)(filed April 27, 2016); *U.S. v. Hitachi Metals, Ltd.*, Case No. 14-CR-00394 (N.D. Ohio)(filed October 31, 2014); *U.S. v. Hitachi-LG Data Storage, Inc.*, Case No. 11-CR-00724 (N.D. Cal.)(filed September 30, 2011); *U.S. v. Hitachi Displays Ltd.*, Case No. 09-CR-00247 (N.D. Cal.)(filed March 10, 2009).

fine range as well as the government's recommendation that HIAMS be sentenced to a term of probation of two years. *See infra* Section III (C) at p. 14. Pursuant to U.S.S.G. § 8C2.8(a)(7) and Application Note 5, one of the factors a Court can consider in determining the specific fine within the Guidelines range is any prior civil or criminal misconduct by the organization other than that counted under § 8C2.5(c). Thus the Court should consider HIAMS' guilty plea in *HIAMS I* as well as the other Hitachi-related cases identified in footnote 3, in finding that a fine in the middle of the Guidelines range is appropriate in this case.

Furthermore, had HIAMS reported the shock absorbers conspiracy during the first investigation, it would have been eligible for leniency pursuant to the Antitrust Division's Corporate Leniency Policy, and not faced charges or a criminal fine for that conduct. The Leniency Policy provides huge incentives for corporations, including those under investigation, to uncover and report additional criminal violations of the antitrust laws. However, if a company that is under investigation for criminal violations of the antitrust laws fails to uncover and report additional violations, and, as happened in this case, those violations are subsequently uncovered, the Antitrust Division has publically stated that at sentencing that company should face higher penalties.[4]

[4] This policy is referred to as the Antitrust Division's Penalty Plus policy. Pursuant to that policy, because HIAMS did not report the shock absorbers conspiracy at the time of the first investigation, the starting point for the fine is at least the midpoint of the Guidelines fine range. *See* Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech before the ABA Section of Antitrust Law Spring Meeting (March 29, 2006), *available at* https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations. While the Antitrust Division's Leniency policy provides a carrot for companies to cooperate and report other instances of antitrust violations, the Penalty Plus policy provides the stick for those companies that choose not to fully cooperate. *See also* Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters, p. 11 (update published January 26, 2017), *available at* https://www.justice.gov/atr/page/file/926521/download.

Additionally, HIAMS' cooperation in the government's shock absorbers investigation was not timely. HIAMS was the last corporate defendant to cooperate and plead guilty in this investigation. HIAMS was served with a grand jury subpoena related to shock absorbers in April 2014. Given its recent guilty plea to an antitrust crime involving the manufacture and sale of other auto parts, HIAMS was uniquely positioned to quickly and completely cooperate. However, despite the previous conviction, it appears that HIAMS took a wait and see approach. It did not begin cooperating until after one of its co-conspirators pled guilty in late 2015. Nonetheless, while not timely, HIAMS' agreement to plead guilty shows that it has clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct in this case. *See* U.S.S.G. § 8C2.5(g) and comment 13.

In determining the appropriate fine within the Guidelines range, "the court may consider the relative importance of any factor used to determine the range" including "aggregating or mitigating factor[s] used to determine the culpability score." *See* U.S.S.G. § 8C2.8(b). The Sentencing Guidelines recognize the importance of early cooperation and rewards early and full cooperation with a reduction of the culpability score. *See* U.S.S.G. § 8C2.5(g). Consistent with the Guidelines, the Antitrust Division has publically stated that later cooperators generally will not receive the same rewards as earlier cooperators in determining an appropriate fine.[5] Given the importance of timely cooperation, it is appropriate in this case for the Court to consider HIAMS' delayed

[5] *See* Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech before the ABA Section of Antitrust Law Spring Meeting (March 29, 2006), *available at* https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations.

cooperation in determining the appropriate fine within the Guidelines range and sentence HIAMS to pay a fine in the middle of the Guidelines range.

The importance of conducting internal investigations designed to uncover additional antitrust violations and timely cooperation set forth in the publically disseminated policies of the Antitrust Division detailed above are consistent with the policies set forth in the Sentencing Guidelines and provide predictability and transparency for corporate defendants facing sentencing for violations of the antitrust laws. Applying these policies to HIAMS will maintain consistency and thus avoid unwarranted sentence disparities among similarly situated defendants. 18 U.S.C. § 3553(a)(6).

While HIAMS' cooperation was not timely, since reaching a Plea Agreement in July 2016, HIAMS has fully cooperated in the Antitrust Division's on-going investigation of the shock absorbers industry. To date, HIAMS has provided a proffer of the conduct it was involved in relating to shock absorbers and provided additional proffers of the expected testimony of certain employees who were involved in, or had knowledge of, the conspiracy. Pursuant to the Plea Agreement, HIAMS has also produced documents from Japan relevant to the conduct at issue and provided translations of those documents. Pursuant to the Plea Agreement, HIAMS has made employees who are located outside of the United States and thus beyond the reach of grand jury subpoena, available for interviews in the United States and has provided translators to facilitate those interviews.

Therefore, the government recommends that HIAMS be sentenced to pay a fine of $55.48 million which is in the middle of the Guidelines range, but at the low end of the agreed-upon fine range of not more than $59.18 million, but at least $55.48 million set

forth in paragraph 9 of the Plea Agreement. The agreed-upon fine range was intended to incentivize and reward HIAMS for cooperation provided after it agreed to plead guilty and before it is sentenced. Because HIAMS has cooperated in the Antitrust Division's on-going investigation, the government has recommended a fine at the low end of the agreed-upon range.

b. The Seriousness of the Offense (3553(a)(2)(A))

Antitrust conspiracies are by their very nature serious offenses. Antitrust crimes strike a blow to the heart of the nation's economy -- competition. When competition is eliminated, as it was here, consumers are likely to pay higher prices for goods and services. According to the background comments in the Antitrust Guideline, "there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm." U.S.S.G. § 2R1.1, commentary (backg'd.).

c. Deterrence and Protecting the Public from Further Crimes of the Defendant (3553(a)(2)(B) and (C))

A fine in the middle of the Guidelines fine range is also appropriate in this case because the substantial criminal fine of $55.48 million recommended in this case provides adequate deterrence to criminal conduct and is necessary to deter future criminal violations of the antitrust laws. *See generally* U.S.S.G. § 8C2.8 and § 2R1.1, comment. (backg'd.).

Finally, as discussed below, HIAMS has begun to implement an enhanced compliance policy to educate its employees to ensure that the company does not violate the antitrust laws in the future. The implementation of an effective compliance program

will protect the public from future violations of the antitrust laws. *See* U.S.S.G. § 8C2.8(a)(11).

2. Relevant Section 3572 Factors

a. Preventing Recurrence of the Offense -- Compliance (3572(a)(8))

In July 2011, HIAMS was simultaneously searched in the United States and Japan in connection with investigations of violations of antitrust laws. Shortly thereafter, HIAMS issued a notice to its employees prohibiting contacts with employees at competitor companies. However, it was not until early 2013, after it settled antitrust charges in Japan, that HIAMS implemented an enhanced compliance policy. The enhanced compliance policy, which was approved by Japan's antitrust authority, included increased training, an enhanced "hotline" for reporting potential antitrust violations, and a provision for punishment, including possible termination, for employees who violate antitrust laws.

At that same time, the company also began an audit of its sales divisions to determine if there were any additional violations of antitrust laws. However, perhaps because the emphasis on compliance was new, the cartel conduct related to shock absorbers was not uncovered during the audits in 2013. More likely, however, the conduct was not uncovered because, as HIAMS top management acknowledged during a training presentation in October 2014, many employees viewed the compliance program as a façade since supervisors routinely approved cartel conduct that violated the antitrust laws. Further, those cartels had operated for decades with no consequence and for decades employees had been trained that meeting with competitors and reaching agreements was how business was conducted. Employees, therefore, likely did not feel

the need report their participation in cartels because they did not believe that the company was serious about the need to comply with the antitrust laws. Management also acknowledged that there had been an inadequate deployment and implementation of the internal reporting system.

After this acknowledgement HIAMS stepped up efforts to design and implement an enhanced compliance program to detect and ultimately prevent violations the antitrust laws by fostering a corporate culture of compliance. HIAMS established a compliance office with a Director of Compliance, and by mid-2015, compliance officers were appointed for all group companies worldwide. Throughout 2014 and into 2015, HIAMS increased and emphasized antitrust training, including implementing e-learning. New rules relating to contacts with competitors were developed and implemented for all employees, the hotline was enhanced to include electronic reporting, and the company instituted a "Special Confession Program," designating an "amnesty" month during which employees were encouraged to report all violations of the antitrust laws in the last ten years with no fear of negative consequences. Finally, in July 2015, HIAMS instituted "Compliance Day" to coincide with the anniversary of the day the search warrants were served in the first investigation. This day is devoted to training about antitrust violations, including a discussion of the consequences of antitrust violations to the company, to prevent future violations. Direction for these changes came not only from the president of HIAMS, but was also directed by Hitachi, Ltd., the parent company of HIAMS.

Nonetheless, in April 2014, when confronted with allegations of violations of the antitrust laws relating to shock absorbers, the company's response was slow and, as noted above, HIAMS did not cooperate in the government's investigation until after one of its

co-conspirators pleaded guilty in late 2015. Furthermore, HIAMS has also been slow to discipline culpable employees, which is a key component to an effective compliance program. Employees that were involved in the conduct that resulted in *HIAMS I* were not disciplined until June 2015.

On paper HIAMS' enhanced antitrust compliance policy has the hallmarks of an effective compliance policy, including direction from top management at the company, training, anonymous reporting, proactive monitoring and auditing, and provision for disciplining employees who violate the policy. The question remains, however, if the paper policy can change the culture of the company that has existed for decades and prevent recurrence of the offense. To ensure that HIAMS remains focused on implementing a robust antitrust compliance policy, the Antitrust Division recommends that the Court sentence HIAMS to a two-year term of probation during which the Court, Probation, and the Antitrust Division can monitor HIAMS' continued implementation of its enhanced antitrust compliance policy.

b. Discipline of Culpable Actors (3572 (a)(8))

In January 2016, several HIAMS employees who were implicated in the shock absorbers conduct were effectively demoted and no longer have sales responsibilities. It should be noted that these demotions did not occur until more than 18 months after HIAMS was notified of the allegations of antitrust violations relating to shock absorbers.

c. The Defendant's Financial Position (3572 (a)(1))

The Defendant is a solvent corporation and has agreed to pay the recommended fine of $55.48 million within 15 days of the final judgment.

Finally, it is the position of the Department of Justice that sentences determined pursuant to the Sentencing Guidelines are reasonable and take into account the statutory factors that require the sentence imposed reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence, and protect the public. Additionally, sentences determined pursuant to the Sentencing Guidelines avoid unwarranted sentence disparities among defendants.

C. Probation

Pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but not more than five years. In considering whether to impose a term of probation, and the length and conditions of any term of probation, the Court should consider the factors set forth in 18 U.S.C. § 3553. *See* 18 U.S.C. § 3562. However, as noted above, because HIAMS is a corporation, many of those factors do not apply. For the same reason, many of the conditions of probation set forth in 18 U.S.C. § 3563 are not applicable. The conditions of probation set forth in 18 U.S.C. § 3563 fall into two categories: mandatory and discretionary. Mandatory conditions that apply to corporations include: that the defendant not commit another crime during the term of probation (18 U.S.C. § 3563(a)(1)); that the defendant make restitution (if appropriate) and pay the special assessment (18 U.S.C. § 3563(a)(6)); that the defendant notify the Court of changes in economic circumstances that would interfere with the defendant's ability to pay fines, restitution, or the special assessment (18 U.S.C. § 3563(a)(7)); and that the defendant pay the fine (18 U.S.C. § 3563(a)). Pursuant to 18 U.S.C. § 3563(b) the Court can order additional discretionary conditions that are related to the factors set forth in 18 U.S.C. § 3553.

The Court should also consider the factors in U.S.S.G. § 8D1.1 which set forth the circumstances under which a sentence to a term of probation is required. These circumstances include ordering a term of probation to secure payment of the special assessment, the fine, or restitution, U.S.S.G. § 8D1.1(a)(1) and (2), or to ensure implementation of an effective compliance program, U.S.S.G. § 8D1.1(a)(6) and (8). "The term of probation should be sufficient, but not more than necessary, to accomplish the court's specific objectives in imposing the term of probation." U.S.S.G. § 8D1.2, Application Note 1.

In this case, the United States recommends that HIAMS be sentenced to a term of probation of two years with conditions set forth in Paragraph 9(d)(i) of the Plea Agreement. The Defendant does not join in this recommendation. Pursuant to Paragraph 9(d)(iii) of the Plea Agreement, the imposition of probation by the Court will not void the Plea Agreement.

The United States believes that a term of probation of two years is sufficient time to enable the Court, the Probation Office, and the United States to monitor the continued implementation of HIAMS' enhanced antitrust compliance program and evaluate the effectiveness of that program to ensure that HIAMS does not violate the antitrust laws in the future.

As set forth in Paragraph 9(d)(i) of the Plea Agreement, the United States recommends the Court impose the following conditions in this case.

(1) The Defendant shall continue to implement and maintain an effective antitrust compliance program.

(2) The Defendant shall promptly report to the Antitrust Division all credible information it has regarding criminal violations of the U.S.

> antitrust laws that the Defendant, any of its Related Entities, or any of their current or former directors, officers, or employees committed after August 23, 2011. For the purposes of this subsection (2), the Defendant will be deemed to have all information within the awareness of its Board of Directors, management, or legal and compliance personnel.
>
> (3) The Defendant shall report once per year to the Probation Office and to the Antitrust Division regarding all aspects of its antitrust compliance program, beginning no later than one year after the date of conviction.
>
> (4) Pursuant to U.S.S.G. § 8D1.3(a), Defendant will not commit another federal, state, or local crime during the term of probation.
>
> (5) Should the Defendant fail to fully implement and maintain an effective antitrust compliance program, fail to make timely and complete reports regarding its antitrust compliance program, or fail to report credible information regarding criminal violations of the U.S. antitrust laws, the United States reserves the right to seek from the Court an order requiring the Defendant to hire an independent, court-appointed monitor, at the Defendant's expense, to fully implement and maintain an effective antitrust compliance program.

Condition (4) is a mandatory condition. *See* 18 U.S.C. § 3563(a)(1) and U.S.S.G. § 8D1.3(a). The other conditions recommended by the United States are reasonably necessary to ensure that HIAMS continues to implement and maintain an effective antitrust compliance program to deter future antitrust violations and to protect the public from further crimes of the Defendant. *See* 18 U.S.C. § 3553(a)(2)(B) and (C), 18 U.S.C. § 3563(b)(15), U.S.S.G. § 8D1.3(c), and U.S.S.G. § 8D1.4(b).

D. Restitution

The United States recommends that the Court not sentence the Defendant to pay restitution. Restitution is not mandatory for violations of 15 U.S.C. § 1, and fashioning a restitution order in this case would complicate and prolong the sentencing process. *See* 18 U.S.C. § 3663(a)(1)(B)(ii). Additionally, the United States and HIAMS have agreed to recommend that restitution is not appropriate in this case in light of the availability of

civil causes of action, 15 U.S.C. § 15, that potentially provide for a recovery of a multiple of actual damages. *See* Plea Agreement ¶ 9(e).

E. Special Assessment

In addition to any fine imposed, the Court should order HIAMS to pay a $400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B).

IV. RECOMMENDED SENTENCE

Pursuant to the 11(c)(1)(C) Plea Agreement between the United States and HIAMS, based on the cooperation provided by HIAMS during the period after it agreed to plead guilty and the date of its sentencing, the United States recommends that the Court sentence HIAMS to pay a fine of $55.48 million payable in full before the fifteenth day after the date of judgment. Since this fine is within the range of $55.48 million to $59.18 million set forth in Paragraph 9 of the Plea Agreement, pursuant to the Plea Agreement, HIAMS will not object to the imposition of this fine. This fine is within the Guideline's fine range and takes into consideration that HIAMS was the last company involved in the shock absorbers conspiracy to agree to plead guilty and cooperate in the government's investigation and that HIAMS did not uncover and report its involvement in the shock absorbers conspiracy when it was under investigation for similar conduct relating to other auto parts, as well as the cooperation that HIAMS has provided since it agreed to plead guilty and accept responsibility in this case.

Pursuant to the 11(c)(1)(C) Plea Agreement between the United States and HIAMS, the United States and HIAMS, also recommend that no order of restitution be entered in this case and that a $400 special assessment be imposed.

Finally, the United States recommends that as part of HIAMS' sentence the Court impose a term of probation of two years with the conditions specified in paragraph 9(d)(i) of the Plea Agreement.

The sentence recommended in this case takes into account the factors enumerated in 18 U.S.C. §§ 3553, 3563, and 3572, as well as factors enumerated in the Sentencing Guidelines, and is a sentence sufficient, but not greater than necessary, to reflect the seriousness of the offense, to promote respect for the law, and to afford adequate deterrence.

V. CONCLUSION

For these reasons, the United States recommends that the Court impose a sentence requiring the Defendant to pay a fine of $55.48 million, payable within 15 days of judgment, no order of restitution, a two year term of probation, and to pay a $400 special assessment.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 1:16-CR-00078
	)	
	)	Filed: August 9, 2016
v.	)	
	)	Violation: 15 U.S.C. § 1
HITACHI AUTOMOTIVE SYSTEMS, LTD.	)	
	)	
	)	Judge: Michael R. Barrett
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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Respectfully submitted,

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HITACHI AUTOMOTIVE SYSTEMS, LTD.	)	
	)	
	)	Judge: Michael R. Barrett
	)	
Defendant.	)	
	)	

DEFENDANT'S SENTENCING MEMORANDUM

I. INTRODUCTION

Hitachi Automotive Systems, Ltd. ("HIAMS") is scheduled to appear before this Court for sentencing on February 16, 2017, at 10:00 am. HIAMS adopts the United States' and the United States Probation Office's ("Probation Office") summary of offense and fine methodology, including the calculations under the United States Sentencing Guidelines ("U.S.S.G.," "Sentencing Guidelines," or the "Guidelines"). *See* United States Sent. Mem. at 3-5, Doc. 18 at PageID 100-102; Final Presentence Investigation Report ("Presentence Report") ¶¶ 25-32, 86-100. Further, pursuant to the Fed. R. Crim. P. 11(c)(1)(C) Plea Agreement between the parties, *see* Plea Agreement ¶ 9(b), Doc. 3 at PageID 16, HIAMS does not oppose the United States' recommendation of a fine amount of $55.48 million.[1]

[1] While the Probation Office recommends a fine of $58.5 million, *see* Presentence Report at Recommendation, in its Addendum to the Report, it notes that this recommended fine amount "does not take into account any cooperation provided by the defendant as this information would be provided independently by [the United States]." *See* Addendum to the Presentence Report at 2-3. As detailed in the United States' Sentencing Memorandum, HIAMS has provided extensive cooperation to the Department of Justice. *See* United States Sent. Mem. at 9, Doc. 18 at PageID 106. In addition, while HIAMS does not oppose the United States' recommendation regarding the fine amount, its silence on this issue should not be taken as an endorsement of the bases underlying the United States' recommendation.

The sole area of disagreement between HIAMS and the United States is regarding the recommendation of a term of probation.[2] The United States and the Probation Office have recommended a term of probation of two years. *See* United States Sent. Mem. at 1, 18, Doc. 18 at PageID 98, 115; Presentence Report at Recommendation. However, for the reasons set forth below, HIAMS respectfully asks the Court to exercise its discretion and impose no term of probation.

II. PROBATION IS NOT WARRANTED UNDER THE FACTORS SET FORTH IN U.S.S.G. § 8D1.1 OR 18 U.S.C. § 3553 BECAUSE HIAMS HAS A PROVEN TRACK RECORD OF EMPLOYING A COMPREHENSIVE COMPLIANCE PROGRAM AND THERE ARE NO COMPELLING FACTORS PRESENT WARRANTING THIS EXCEPTIONAL SANCTION

The touchstone of the probation analysis is necessity. 18 U.S.C. § 3553(a) provides that the Court shall impose a sentence that is "sufficient, but not greater than necessary" to comply with the purposes of sentencing. Likewise, the Commentary to the Sentencing Guidelines provides that a term of probation "should be sufficient, but not more than necessary, to accomplish the court's specific objectives in imposing the term of probation." U.S.S.G. § 8D1.2, cmt. 1.

Probation is not a necessary sanction for HIAMS because HIAMS has a proven and effective compliance and ethics program, which the United States has acknowledged as having the hallmarks of an effective compliance policy, and which the Probation Office has recognized as comprehensive. *See* U.S.S.G. § 8D1.1(a)(3); United States Sent. Mem. at 13, Doc. 18 at PageID 110; Presentence Report at Recommendation. Moreover, probation is not necessary because HIAMS has made changes to its compliance program in order to reduce the likelihood of future criminal conduct. *See* U.S.S.G. § 8D1.1(a)(6). The Presentence Report recognizes that

[2] The United States has made several characterizations regarding the timeliness of HIAMS's cooperation in the shock absorbers investigation. HIAMS does not agree with all of these characterizations, but as they are not relevant to the analysis of the probation factors they are not addressed in this memorandum.

"[i]n looking at the tenets of U.S.S.G § 8D1.1, HIAMS has satisfied many of the requirements needed to avoid the imposition of a term of probation," and "meets the majority of the criteria outlined at U.S.S.G § 8D1.1."[3] *See* Addendum to the Presentence Report at 2. After an extensive investigation and site visit, the Presentence Report concludes that "the company's culture has completely changed regarding compliance issues and [it is] dedicated to preventing any future violation of antitrust laws." Presentence Report ¶ 50. Under the Sentencing Guidelines analysis and the principles underpinning it, probation is therefore not warranted.

Probation is also not otherwise necessary to accomplish one of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) (referenced in § 8D1.1(a)(8)), as HIAMS has already demonstrated a commitment to compliance and respect for the law during the several years the compliance program has operated since the conduct at issue in this case ended in 2011. Further, the Japanese Government, through the Japan Fair Trade Commission ("JFTC") has evaluated and approved elements of HIAMS's compliance program and the Court should give due weight to its conclusions. Finally, probation is a rare sanction in corporate antitrust cases, reserved for egregious offenders, and, just as similarly situated defendant Kayaba Industry Co., Ltd., ("Kayaba") did not receive probation, neither should HIAMS. *See United States v. Kayaba Indus. Co., Ltd.*, 15-cr-00098 (S.D. Oh.).

[3] Chapter 8, Part D of the Guidelines states that the court shall order a term of probation for one of eight specified reasons. This Sentencing Memorandum individually addresses Sections 8D1.1 (a)(3) and (6), and asserts that neither subsection is a basis for probation in this case. The remaining subsections are inapplicable to this matter and are not relevant to the Court's analysis. Specifically, there is no restitution or community service, § 8D1.1(a)(1), or the need to safeguard HIAMS's ability to make fine payments, § 8D1.1(a)(2). Sections 8D1.1 (a)(4), (5), and (7), relating to prior criminal adjudications and sentences with no fine component, are equally inapplicable given the facts of this case.

A. HIAMS's Compliance and Ethics Program, Which Has Been in Place Since 2011, is Comprehensive and Effective and Exceeds the Standards Set Forth in U.S.S.G. § 8B2.1

Under U.S.S.G. § 8D1.1(a)(3), the Court shall order a term of probation if an organization of fifty or more employees does not have an effective compliance and ethics program in place. Relatedly, U.S.S.G. § 8D1.1(a)(6) provides that probation shall be ordered if necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct. U.S.S.G. § 8B2.1 sets forth the standards for evaluating whether an organization has an effective compliance and ethics program. HIAMS's compliance program meets each of the main elements required under the Sentencing Guidelines, as is recognized by the Presentence Report. *See* Presentence Report at Recommendation ("HIAMS has implemented a comprehensive compliance program and is working diligently to ensure future violations do not occur.") Importantly, however, HIAMS's program not only meets these standards today, but it has been meeting these standards for the past six years. As discussed below, the more recent changes and improvements to the compliance program have simply *enhanced* the otherwise sufficient program. The Court should credit the fact that HIAMS continues to improve its program, as this is a mark of a self-reflective and compliance-oriented company.

1. HIAMS's Compliance Program is Not Untested—the Central Architecture of the Program has been in Operation For At Least Six Years, Coinciding with the End of the Offense Conduct in 2011

HIAMS's compliance program is not first being implemented in response to the resolution in this case; rather, the core elements and basic structure of HIAMS's compliance program have been in place for several years, with the essential architecture of the program coming into place in 2010 and 2011, at approximately the same time the conduct underlying the offense in this case ended. In 2010 HIAMS promulgated its Code of Conduct and Compliance Rules. *See* Presentence Report ¶ 52. It was also in this year that the modern-day Compliance

Promotion Organization was established. *See* Presentence Report ¶ 59. In 2011, the rules regarding competitor contact, including reporting requirements, were first promulgated. *See* Presentence Report ¶ 56. As discussed below, though there have been improvements and expansions of these elements in recent years, the key elements of the compliance program have been in operation for some time.

The comprehensive and "impressive" nature of the compliance program is unquestioned by the Probation Office. *See* Presentence Report at Recommendation. The United States similarly acknowledges that HIAMS has "stepped up efforts to design and implement an enhanced compliance program to detect and ultimately prevent violations [of] the antitrust laws by fostering a corporate culture of compliance," and details several of the improvements made to the program in recent years. United States Sent. Mem. at 12, Doc. 18 at PageID 109. Below are the essential elements of HIAMS's compliance activities that have been in place for several years. HIAMS's compliance program easily satisfies the requirements of U.S.S.G. § 8B2.1, and therefore HIAMS respectfully submits to the court that probation is not warranted under U.S.S.G. § 8D1.1(a)(3) or § 8D1.1(a)(6).

a) *HIAMS has established standards and procedures to prevent and detect criminal conduct – § 8B2.1(b)(1)*

HIAMS has enacted written standards and protocols designed to detect, deter, and prevent problematic conduct, including by enacting guidelines and company rules such as: (1) a Code of Conduct (first enacted in 2010); (2) Compliance Rules (first enacted in 2010); and (3), given the nature and risks of the industry, specific policies related to competitor contact (first enacted in 2011). The rules prohibiting competitor contact provide limited exceptions for specific and legitimate purposes, for which approval must be obtained in advance, and a report documenting the contact must be submitted afterwards. *See* Presentence Report ¶¶ 52-58.

b) *HIAMS has implemented a worldwide compliance promotion organization, which features the full support and active involvement of senior executives – § 8B2.1(b)(2)*

In 2010, in order to permeate the compliance culture throughout the organization, HIAMS developed a "Compliance Promotion Organization," which is a multi-tiered structure, with involvement at many levels of the company, in Japan and globally. The Compliance Promotion Organization is a worldwide structure, which features the full support and active involvement of senior executives, with duties and roles assigned at various levels of the company, including a Compliance Committee which is overseen by a Chairman, who is the President and CEO of the company. *See* Presentence Report ¶¶ 59-60.

c) *HIAMS has created and publicized an effective whistleblowing system – § 8B2.1(b)(5)(C)*

Since 2009, HIAMS has had in place an internal reporting procedure, referred to as the Hot Line Policy, which allows any member of the organization to report suspected criminal violations, breaches of rules and regulations, and other wrongdoing, anonymously and without fear of retaliation. HIAMS publicizes the hotline to employees in various ways, including by publishing references to the hotline in training materials and by posting easily accessible and visible links on HIAMS's and its affiliate Hitachi Automotive Systems Americas, Inc.'s intranet. HIAMS employees can also avail themselves of the whistleblowing hotline of parent company Hitachi, Ltd. *See* Presentence Report ¶¶ 61-62, 74.

d) *HIAMS has created a comprehensive training program – § 8B2.1(b)(4)*

HIAMS has created a comprehensive training program, which communicates all aspects of the compliance program, and which involves all levels of employees, and is tailored appropriately to employees' roles. One key facet of HIAMS's training programs is that they are interactive and require employee involvement. Rather than simply sending training materials to

employees, or even hosting in-person lectures, several aspects of HIAMS's training program are interactive in nature, requiring employees to grapple with the concepts presented. For example, employees are asked to fill out self-assessment checklists and to engage in workplace discussions, the latter of which involve the use of carefully crafted and substantive discussion prompts designed to promote in-depth discussion of compliance issues. *See* Presentence Report ¶¶ 66-67.

e) *HIAMS has developed creative and impactful ways of disseminating compliance information beyond training, such as through interactive workshops and computer pop-up messages – § 8B2.1(b)(4)*

In addition to standalone training programs, HIAMS also employs a number of activities that serve to educate on compliance topics as well as to further embed compliance as company culture. Two of these initiatives are "Corporate Ethics and Compliance Month" (each October), and "Compliance Day" (one day each July). Compliance Month was first instituted in 2009. (Compliance Day was added in 2015.) These activities collectively involve the circulation of compliance-oriented messages, workplace discussions regarding compliance themes, compliance-themed computer pop-up messages, and the administration of compliance oaths, among other activities. *See* Presentence Report ¶¶ 68-70.

f) *HIAMS engages in structural and targeted auditing – § 8B2.1(b)(5)(A) and § 8B2.1(b)(5)(B)*

At regular intervals, HIAMS engages in *structural* auditing, to make sure that the compliance program is being institutionalized effectively, by employing many methods to evaluate its processes and controls, such as by tracking employee participation in training, evaluating pre-approval reports regarding competitor contact and tracking post-event notifications, and re-examining company rules and assessing their accessibility. Additionally, HIAMS engages in *targeted* auditing, to monitor and evaluate specific activity of key

departments and personnel to ensure that wrongdoing is detected. *See* Presentence Report ¶¶ 71-72.

An assessment of the compliance program as it existed as of 2011 would yield a finding of a robust and comprehensive compliance program.[4] A term of probation is therefore not warranted on this basis. As detailed below, however, HIAMS has continued to improve its program, making probation even less necessary.

2. HIAMS Has Made a Number of Improvements to Its Compliance Program in Recent Years; Rather than Suggesting the Compliance Program is New, Improvements to the Program are Required under U.S.S.G. § 8B2.1(b)(7) and § 8B2.1(c) and Illustrate a Continued Commitment to Compliance

As noted throughout the Presentence Report, HIAMS has made a number of enhancements to its compliance program in recent years. The Sentencing Guidelines require organizations to take steps after identifying criminal conduct, and in connection with periodic assessments, to take steps to "design, implement, or *modify* each requirement" of its compliance program. U.S.S.G. § 8B2.1(b)(7) and § 8B2.1(c) (emphasis added). Rather than suggesting HIAMS's compliance program is not fully mature, these enhancements illustrate that HIAMS engages in critical self-evaluation and is committed to constant improvement of its compliance program.

[4] The United States has urged the Court to consider, for the purpose of accepting the fine recommendation, the fact that HIAMS did not "uncover and report the conduct charged in this case when it was under investigation in the first case." United States Sent. Mem. at 6, Doc. 18 at PageID 103. While HIAMS does not take issue with the United States' reliance on this fact to arrive at a fine recommendation, HIAMS respectfully submits that it has no bearing on the probation analysis. The Sentencing Guidelines explicitly recognize that "[t]he failure to prevent or detect the instant offense does not necessarily mean that the [compliance] program is not generally effective in preventing and detecting criminal conduct." U.S.S.G. § 8B2.1(a). Even by the Department of Justice's own guidelines, the standard for evaluating a compliance program is "whether the program is *adequately designed* for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives." United States Dep't of Justice, U.S. Attorneys' Manual § 9-28.800 "Corporate Compliance Program," cmt. [2015], available at https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations (emphasis added). The U.S. Attorneys' Manual recognizes that "no compliance program can ever prevent all criminal activity by a corporation's employees."

In other words, the recent enhancements to HIAMS's compliance program did not change the basic structure of the program, rather they serve to amplify key aspects of the program and to improve its efficiency and effectiveness. HIAMS's willingness to constantly assess the effectiveness of its program and make improvements as needed also demonstrates that its compliance program is not a "paper" program. Below are the recent enhancements to the compliance program:

- 2015 enhancement to competitor contact reporting procedures – § 8B2.1(b)(1): As mentioned above, HIAMS's competitor contact rules have been in place since 2011. In 2015, in an effort to increase the efficiency of these procedures, HIAMS created a new electronic system that includes a centralized database that allows applicants seeking preapproval for competitor contact, supervisors, and those with authority to approve the requests to easily check their status. The electronic system also reduces omissions as it automatically prompts individuals to complete required post-contact reports after having contact with competitors. *See* Presentence Report ¶¶ 56-58.
- 2013, 2014, and 2015 enhancement and expansion of compliance promotion organization – § 8B2.1(b)(2): In 2013, HIAMS expanded the Compliance Promotion Organization, which had been operating since 2010, by creating the position of Chief Compliance Officer, and, in 2014, it further expanded the organization by creating a Compliance Department, which is led by a full-time director. Similarly, in 2015, HIAMS continued its overseas expansion and formalization of its compliance program by creating a "Regional Chief Compliance Officer" program, which was created in order to establish region-specific compliance organizations at each of HIAMS's regional headquarters. *See* Presentence Report ¶¶ 59-60.

- 2014 and 2016 enhancements to whistleblowing policy – § 8B2.1(b)(5)(C): HIAMS has expanded on the whistleblowing program, enacted in 2009, by instituting on two occasions Special Confession Programs (in 2014 and 2016), which encouraged employees to report wrongful conduct using a "carrot and stick" approach. If employees reported relevant conduct they would receive amnesty (in 2014) or possible commutation (in 2016) for their past actions; if they failed to report conduct, they would face strict disciplinary measures. *See* Presentence Report ¶¶ 63-65. This approach is consistent with the requirements of § 8B2.1(b)(6).
- Expansion of training activities – § 8B2.1(b)(4): HIAMS has provided training to its employees for several years as part of its compliance activities. In recent years, the frequency of training has increased and the number of individuals receiving training has expanded. As stated above, in addition to Compliance Month, which has existed since 2009, HIAMS added Compliance Day in 2015. *See* Presentence Report ¶¶ 66-70.
- 2013 expansion of auditing activities – § 8B2.1(b)(5)(A) and § 8B2.1(b)(5)(B): Though auditing has been a part of HIAMS's compliance activities for several years, in 2013 HIAMS made improvements to its audit methodology and increased the frequency of auditing. HIAMS's audit methodology, adopted in 2013, has been approved by the JFTC. *See* Presentence Report ¶¶ 50, 71-72.

HIAMS's continuous evaluation and improvement of its compliance activities indicates its commitment to maintaining a world-class compliance program. HIAMS submits to the Court that it is a *positive* undertaking for HIAMS to continue to make improvements to its compliance program. The improvements and enhancements in recent years are just that; and though HIAMS

strives to make its compliance program better each year, this does not negate the fact that it has had a mature compliance program in place for at least six years.

3. As a Result, HIAMS Has Completely Changed the Company Culture Regarding Compliance

U.S.S.G. § 8B2.1(a) requires that, in order for a company's compliance program to be considered effective, it must "exercise due diligence to prevent and detect criminal conduct" and "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." HIAMS has fulfilled both of these requirements, as recognized by the Probation Office. In recent years, due to the implementation of its modern-day compliance program beginning around 2011, the numerous enhancements as described above, and the company's encouragement to its employees to comply with antitrust (and other) laws, HIAMS's culture has completely changed regarding compliance issues. *See* Presentence Report ¶ 50. The company is dedicated to preventing any future violation of antitrust laws. *See id*. The culture shift has come directly from the highest level of the company, including top management personnel. *See id*. A HIAMS document cited by the United States, *see* United States Sent. Mem. at 11, Doc. 18 at PageID 108, in which the company's top management acknowledged to its employees in a training program the flaws in the past culture, is clear evidence that the critical change in culture has been coming from the top down for the past several years. Notably, the change in the company's culture occurred *after* the conduct at issue in this matter concluded in 2011.

B. Probation is Not Otherwise Necessary to Accomplish One of the Purposes of Sentencing Set Forth in 18 U.S.C. § 3553(a)(2)

Besides the Sentencing Guidelines' probation factors relating to an organization's compliance program, the Guidelines provide that the Court shall order a term of probation "if necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2)." U.S.S.G. § 8D1.1(a)(8). Neither the United States nor the Probation Office claims any deficiency in HIAMS's compliance program; rather, the basis for the probation recommendation seems to rest primarily on this catch-all sentencing provision, and a desire to ensure that HIAMS continues its compliance efforts. *See* Addendum to the Presentence Report at 2; Presentence Report at Recommendation ("HIAMS has implemented a comprehensive compliance program and is working diligently to ensure future violations do not occur. However, given that this is not their first antitrust violation and the fact that their compliance program is relatively new, the recommended term of probation will serve to ensure they continue with their impressive compliance program and continue to implement these strategies moving forward."). In relevant part, § 3553(a)(2) provides that a sentence should promote respect for the law, afford adequate deterrence, and protect the public from future crimes. U.S.S.G. §§ 3553(a)(2)(A)-(C).[5] Respectfully, in this case, probation is not necessary to accomplish one of the articulated purposes of sentencing nor is it necessary to ensure HIAMS continues on a path to success; rather, HIAMS has *already demonstrated* a commitment to compliance and respect for the law during the many years the compliance program has operated in order to prevent the reoccurrence of criminal violations since the conduct at issue in this case ended. Further, the proposed fine amount will be one of the top 55 Sherman Act fines in history.[6] HIAMS's

[5] 18 U.S.C. § 3553(a)(2)(D), regarding provision of educational or vocational training, medical care, or other treatment of the defendant, is not relevant in the context of a corporate defendant.
[6] *See* https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more.

collective punishment for its two antitrust sentences, for conduct that ended by 2011, would place it in the top 15 on this list. HIAMS fully acknowledges the seriousness of the penalty, which has a serious impact on its business and reputation.

Were this a case where HIAMS engaged in consecutive criminal conduct,[7] or where HIAMS newly implemented a compliance program in response to this investigation, then probation might be appropriate, in order to ensure the successful implementation of a program and to promote continued adherence to the law. *See, e.g.*, U.S.S.G. § 8D1.1(a)(3). However, as discussed above, this is *not* such a case. Rather, HIAMS has had a successful compliance program in place for several years, with the critical components being in place since 2011, the year the conduct at issue ended. Since this time, HIAMS's compliance program has been improved and strengthened, consistent with the requirements of U.S.S.G. § 8B2.1 (b)(7) and § 8B2.1(c); however the core of the program has been in place and operating effectively for at least six years.

HIAMS fully agrees with the Probation Office's finding that "[i]n recent years, the company's culture has completely changed regarding compliance issues and [it is] dedicated to preventing any future violation of antitrust laws." Presentence Report ¶ 50. Therefore, rather than needing to rely on a term of probation to ensure that HIAMS continues to execute its

[7] The conduct charged in the present case occurred during the same time period as the conduct charged in a previous case, affecting various automotive parts, which resulted in HIAMS entering into a guilty plea in 2013. *See* U.S. v. Hitachi Automotive Systems, Ltd., No. 2:13-CR-20707 (E.D. Mich. Nov. 6, 2013). As such, HIAMS is not a recidivist, a fact recognized by the United States and the Probation Office. *See* Plea Agreement ¶ 9(a)(ii), Doc. 3 at PageID 16; United States Sent. Mem. at 6, Doc. 18 at PageID 103; Presentence Report ¶ 93; Addendum to the Presentence Report at 2. The United States has urged the Court to consider, for the purpose of accepting the fine recommendation, HIAMS's prior resolution, along with antitrust cases involving other entities that include "Hitachi" as part of their names. *See* United States Sent. Mem. at 6-7, Doc. 18 at PageID 103-104. HIAMS respectfully clarifies for the Court that the list of entities cited by the United States does not include any that could be considered part of the HIAMS organization. The entities may be related in some way to HIAMS's parent company, Hitachi, Ltd., through stock ownership, joint venture, or as a wholly owned subsidiary, but none have any meaningful relationship to HIAMS. Moreover, two of the entities are separately listed on the Tokyo Stock Exchange. Therefore, HIAMS submits that the emphasis on U.S.S.G. § 8C2.8(a)(7), which refers to "any prior civil or criminal misconduct *by the organization* other than that counted under §8C2.5(c)" (emphasis added), is misplaced and should have no impact on the probation analysis.

compliance program going forward, HIAMS's "dedicated" and "diligent" actions over the past six years demonstrate its commitment to the successful implementation of its compliance program going forward; therefore, no term of probation is necessary. Even if the Court should decide that probation is appropriate, in no case could a term of two years be justified.

C. Principles of International Comity Suggest that Due Weight Be Given to the Japanese Government's Evaluation and Approval of HIAMS's Compliance Activities

HIAMS respectfully asks the Court to give due weight to the fact that the compliance and antitrust violation prevention activities of HIAMS, a Japanese corporation, have already been closely scrutinized and supervised by the JFTC. The United States and the Government of Japan are parties to a mutual agreement concerning antitrust enforcement, which recognizes that "[e]ach Party shall give careful consideration to the important interests of the other Party throughout all phases of its enforcement activities, including decisions regarding the initiation of enforcement activities, the scope of enforcement activities and the nature of penalties or relief sought in each case."[8] This principle is aptly applied here.

As noted in the Presentence Report, HIAMS's compliance program consists of elements approved by the Japanese antitrust regulator and enforcement agency, the JFTC. *See* Presentence Report ¶ 50. Following the conclusion of the JFTC's investigation of HIAMS in 2012,[9] it issued an order, in part, requiring HIAMS to create an implementation plan of measures to prevent the reoccurrence of such illegal activities. The JFTC thoroughly reviewed HIAMS's plans to disseminate guidelines on compliance to its employees, for ongoing training of its

[8] Agreement Between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities (Oct. 7, 1999), Art. VI, 1, *available at* https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/3740.pdf.

[9] HIAMS reached resolutions with the JFTC in 2012, related to conduct in a line of business that was at issue in the 2013 U.S. guilty plea. *See* http://www.jftc.go.jp/en/pressreleases/yearly-2012/nov/individual-000507.html.

employees, and for periodic auditing. The JFTC subsequently approved HIAMS's plans in early 2013. *See* Presentence Report ¶ 50.

As part of the JFTC supervision, HIAMS not only had to submit its plan for approval, but it also had to submit a report to the JFTC detailing other activities it performed in accordance with the JFTC order, such as confirming that its Board of Directors has passed a resolution affirming: (i) that it had ceased collaborating with its competitors regarding the products investigated by the JFTC; and (ii) that it would independently carry out its business without engaging in any similar conduct; (iii) that it sent out the required notices to its customers and other perpetrators of the violations informing them of the Board resolution, and (iv) that it had notified its nearly 10,000 employees about the Board resolution.

Therefore, HIAMS requests that the Court not impose probation on HIAMS, given the Japanese Government's previous approval and oversight of its compliance activities.

D. HIAMS Should Not Receive Probation, Which is a Rare Sanction in Antitrust Cases, as It Would Create a Disparity in Sentencing

18 U.S.C. § 3553(a)(6) provides that, in determining a particular sentence, the Court shall consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." In October 2015, Kayaba was sentenced in connection with a violation of 15 U.S.C. § 1, for anticompetitive activity involving the same shock absorbers that are at issue in this matter. *See* Judgment, *United States v. Kayaba Indus. Co., Ltd.*, 15-cr-00098 (S.D. Oh., Nov. 2, 2015), Doc. 26 at PageID 1-3. HIAMS's compliance program appears to contain or exceed the elements of Kayaba's program, as outlined by the United States. *See* United States Sent. Mem. and Mot. for a Downward Departure Pursuant to U.S.S.G. § 8C4.1, *United States v. Kayaba Indus. Co., Ltd.*, 15-cr-00098 (S.D. Oh., Oct. 5, 2015), Doc. 21 at PageID 86-87. For example, HIAMS has adopted the practices

outlined in Kayaba's program, such as: (1) directing change from top management; (2) creating various new compliance policies and a dedicated compliance office and staff; (3) administering training, with associated self-awareness quizzes; (4) establishing and promoting an anonymous reporting system; and (5) engaging in monitoring and auditing. Not only did Kayaba receive no term of probation, it was given credit for having a strong compliance program, even though it appears to have been implemented in large part *after* the start of the investigation. *See id.* HIAMS respectfully submits that just as probation was not necessary for Kayaba, it is equally not necessary for HIAMS.

Finally, the fact that Kayaba did not receive a term of probation highlights a related consideration for the court; namely, that probation is an extremely rare sanction in antitrust cases. The Department of Justice's Antitrust Division has noted that a company is a candidate for probation where it "has no preexisting compliance program or makes no efforts to strengthen a compliance program that has proved ineffective."[10] Conversely, "companies that can demonstrate they have adopted or strengthened existing compliance programs may be able to avoid probation."[11] Therefore, HIAMS requests that the Court apply that same standard here, recognizing that, in the case of a corporate defendant with a robust and effective compliance program, probation is not necessary.

[10] Brent Snyder, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Compliance is a Culture, Not Just a Policy," Sept. 9, 2014, at 8-9, available at https://www.justice.gov/atr/file/517796/download.
[11] *Id.* at 9.

III. CONCLUSION

For these reasons, HIAMS requests that the Court impose a sentence requiring it to pay a fine of $55.48 million, in line with the United States' recommendation, payable within 15 days of judgment, no term of probation, and no order of restitution.[12]

Respectfully submitted,

/s/ Matthew J. Jacobs

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Counsel for Hitachi
Automotive Systems, Ltd.

[12] As the United States acknowledges, see United States Sent. Mem. at 1-2, 16, Doc. 18 at PageID 98-99, 113, pursuant to 18 U.S.C. § 3663, restitution is not mandatory for violations of 15 U.S.C. § 1, and in light of the availability of civil causes of action that potentially provide for a recovery of a multiple of actual damages, see 15 U.S.C. § 15, the United States and HIAMS recommend that the sentence not include a restitution order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 1:16-CR-00078
	)	
	)	Filed: August 9, 2016
v.	)	
	)	Violation: 15 U.S.C. § 1
HITACHI AUTOMOTIVE SYSTEMS, LTD.	)	
	)	
	)	Judge: Michael R. Barrett
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2017, I caused the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

1. Carla M. Stern (carla.stern@usdoj.gov); and
2. Daniel W. Glad (daniel.glad@usdoj.gov)

Respectfully submitted,

/s/ Matthew J. Jacobs

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Automotive Systems, Ltd.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America,
Plaintiff,

v.

Hitachi Automotive Systems, Ltd,

Defendant.

Case No. 1:16cr078
Judge Michael R. Barrett

CRIMINAL SENTENCING MINUTES
Judge Michael R. Barrett

Courtroom Deputy: Barbara Crum
Court Reporter: Official Court Reporter, Maryann Maffia
USPO: Laura Shannon
Date: February 16, 2017 Time: **Commenced** 10:14 **Concluded** 11:08 am **Total** 1:01
10:06 - 10:13
United States Attorney: Carla Sterry/Zoran Tasic Defendant Attorney: Craig Seebold/Matt Jacobs/Jeff Teeters

_____ Dft found to be Guilty by Jury on Count(s)_____ of Indictment
✓ Dft plead to Count(s) 1 of Indictment – (Information)
✓ Court finds the Dft guilty and formally accepts plea

Procedure:

✓ Sentencing
✓ PSI reviewed by the parties. ✓ PSI adopted.
✓ No Objections _____Objections ___ Plaintiff ___Defendant
_____ Considered for sentencing (___ letter(s) from _____
___ ~~Motion by USA/Dft~~ (✓ side bar held/✓ sealed)
✓ Plf sentencing memo / Doc. 18
✓ Dft sentencing memo / Doc. 19
✓ Mitigation ✓ Dft Cnsl Statement ✓ Dft Statement ✓ Plf Statement
___ Other Statements

****

Sentencing:

✓ Defendant sentenced
✓ Probation 18 ~~Years~~ months - Subject to review at
_____ Custody _____Months (remanded/vol sur.)

✓ Fine $55.48 M (~~interest waived~~) to be pd in 15 days from date of judgment
✓ Special Assessment $400.00
_____ Restitution $_____ (interest waived)
_____ Forfeiture

_____ Supervised Release _____Years (Mo.)
_____ Standard/Special Conditions of Sup'd Rel/Probation

__ firearms; ✓ criminal conduct __ DNA	✓ 6-12 months for a report	✓ probation officer satisfied the compliance program is working	___	___
___	___	___	___	___

_____ Dismissal of Counts (Motion/Order) presented

✓ Informed of Defendant's Right to Appeal
_____ Clerk to Prepare Appeal Notice

✓ Interpreter Naraka King present & Sworn.

AO 245E (Rev. 12/03) Judgment in a Criminal Case for Organizational Defendants
Sheet 1

UNITED STATES DISTRICT COURT

SOUTHERN District of OHIO (Cincinnati)

UNITED STATES OF AMERICA
V.

Hitachi Automotive Systems, Ltd

JUDGMENT IN A CRIMINAL CASE
(For Organizational Defendants)

CASE NUMBER: 1:16cr078

Matthew Jacobs/Craig Seebald/Jeffrey Teeters
Defendant Organization's Attorney

THE DEFENDANT ORGANIZATION:

☒ pleaded guilty to count(s) 1 of an Information

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The organizational defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
15 USC 1	Conspiracy to Restrain Trade	summer of 2011	1

The defendant organization is sentenced as provided in pages 2 through 4 of this judgment.

☐ The defendant organization has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant organization must notify the United States attorney for this district within 30 days of any change of name, principal business address, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant organization must notify the court and United States attorney of material changes in economic circumstances.

Defendant Organization's
Federal Employer I.D. No.: None

Defendant Organization's Principal Business Address:

Hitachi Automotive Systems, Ltd
Shiin-Otemachi Building
2-1, Otemachi 2-chome
Chiyoda-ku, Tokyo
100-0004 Japan

Defendant Organization's Mailing Address:

same as above

2/16/2017
Date of Imposition of Judgment

Signature of Judge

Michael R. Barrett, United States District Court
Name and Title of Judge

February 17, 2017
Date

DEFENDANT ORGANIZATION: Hitachi Automotive Systems, Ltd
CASE NUMBER: 1:16cr078

PROBATION

The defendant organization is hereby sentenced to probation for a term of :
Eighteen (18) months subject to review.

The defendant organization shall not commit another federal, state or local crime.

If this judgment imposes a fine or a restitution obligation, it is a condition of probation that the defendant organization pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant organization must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) within thirty days from the date of this judgment, the defendant organization shall designate an official of the organization to act as the organizations's representative and to be the primary contact with the probation officer;
2) the defendant organization shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
3) the defendant organization shall notify the probation officer ten days prior to any change in principal business or mailing address;
4) the defendant organization shall permit a probation officer to visit the organization at any of its operating business sites;
5) the defendant organization shall notify the probation officer within seventy-two hours of any criminal prosecution, major civil litigation, or administrative proceeding against the organization;
6) the defendant organization shall not dissolve, change its name, or change the name under which it does business unless this judgment and all criminal monetary penalties imposed by this court are either fully satisfied or are equally enforceable against the defendant's successors or assignees; and
7) the defendant organization shall not waste, nor without permission of the probation officer, sell, assign, or transfer its assets.

AO 245E (Rev. 12/03) Judgment in a Criminal Case for Organizational Defendants
Sheet 3 — Criminal Monetary Penalties

DEFENDANT ORGANIZATION: Hitachi Automotive Systems, Ltd
CASE NUMBER: 1:16cr078

CRIMINAL MONETARY PENALTIES

The defendant organization must pay the following total criminal monetary penalties under the schedule of payments on Sheet 4.

	Assessment	Fine	Restitution
TOTALS	$ 400.00	$ 55480000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant organization shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant organization makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant organization shall pay interest on restitution or a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 4 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant organization does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT ORGANIZATION: Hitachi Automotive Systems, Ltd.
CASE NUMBER: 1:16cr078

SCHEDULE OF PAYMENTS

Having assessed the organization's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 55480400.00 due immediately, balance due

☐ not later than _____ , or
☒ in accordance with ☐ C or ☒ D below; or

B ☐ Payment to begin immediately (may be combined with ☐ C or ☐ D below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☒ Special instructions regarding the payment of criminal monetary penalties:

Fifteen (15) days following the entry of Judgment.

All criminal monetary penalties are made to the clerk of the court.

The defendant organization shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant organization shall pay the cost of prosecution.

☐ The defendant organization shall pay the following court cost(s):

☐ The defendant organization shall forfeit the defendant organization's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. **: CASE NO: 1:16-CR-78**
: JUDGE BARRETT

HITACHI AUTOMOTIVE SYSTEMS, LTD.,

Defendant.

SATISFACTION OF CRIMINAL JUDGMENT

The judgment in the above-entitled case having been paid, the Clerk of the United States District Court for the Southern District of Ohio is hereby authorized and empowered to cancel said judgment of record regarding monetary penalties with the exception of any asset forfeiture judgments which may have been imposed.

Respectfully submitted,

BENJAMIN C. GLASSMAN
United States Attorney

s/ Bethany J. Hamilton
BETHANY J. HAMILTON (0075139)
Assistant United States Attorney
Southern District of Ohio
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Craig P. Seebaid, Matthew Jay Jacbos, Katherine Choi Kim, Brian David Schnapp, and Jeffrey R. Teeters, attorneys for the Defendant.

s/ Bethany J. Hamilton
BETHANY J. HAMILTON (0075139)
Assistant United States Attorney

Jury Instructions

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL MARR,
JAVIER SANCHEZ, and
GREGORY CASORSO,

Defendants.

CASE NO. CR 4:14-00580 PJH

FINAL JURY INSTRUCTIONS

INSTRUCTION NO. 18

DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return – that is a matter entirely up to you.

INSTRUCTION NO. 19

PER SE VIOLATIONS OF THE ANTITRUST LAWS

The Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are conclusively presumed to be illegal, without inquiry about the precise harm they have caused or the business excuse for their use. Included in this category of unlawful agreements are agreements to rig bids.

Therefore, if you find that the government has met its burden with respect to each of the elements of the charged offense, you need not be concerned with whether the agreement was reasonable or unreasonable, the justifications for the agreement, or the harm, if any, done by it. It is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results. If there was, in fact, a conspiracy as charged in the indictment, it was illegal.

INSTRUCTION NO. 20

ELEMENTS OF THE BID RIGGING OFFENSES

Each defendant is charged with one or two counts of bid rigging, in violation of the Sherman Act, Section 1 of Title 15 of the United States Code. One count of the indictment charges the defendants Michael Marr, Javier Sanchez, and Gregory Casorso with entering into and engaging in a conspiracy which consisted of a continuing agreement, understanding, and concert of action among the defendants and coconspirators to suppress competition by refraining from and stopping bidding against each other to purchase hundreds of selected properties at public auctions in Alameda County at non-competitive prices. Another count of the indictment charges the defendants Michael Marr and Javier Sanchez with entering into and engaging in a conspiracy that consisted of a continuing agreement, understanding and concert of action among the defendants and coconspirators to suppress competition by refraining from and stopping bidding against each other to purchase hundreds of selected properties at public auctions in Contra Costa County at non-competitive prices.

In order to establish the offense of conspiracy to rig bids as charged in the indictment, the government must prove each of these elements beyond a reasonable doubt:

One, that the conspiracy described in the indictment existed at or about the time alleged:

Two, that the defendant knowingly became a member of the conspiracy; and

Three, that the conspiracy described in the indictment occurred within the flow of interstate commerce.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all of the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

INSTRUCTION NO. 21

BID RIGGING

The indictment charges each defendant with one or two counts of conspiring to rig bids. Under the first element and for purposes of a violation of the Sherman Antitrust Act, a conspiracy to rig bids is an agreement between two or more competitors to eliminate, reduce, or interfere with competition for something that is to be awarded on the basis of bids. A conspiracy to rig bids may be an agreement among competitors about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding; or any other agreement with respect to bidding that affects, limits, or avoids competition among them.

The aim and result of every bid-rigging agreement, if successful, is the elimination of one form of competition.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, exchanged information, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

If you should find that a defendant entered into an agreement to rig bids, the fact that he or his coconspirators did not abide by it, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is not a defense. The agreement is the crime, even if it was never carried out. An internal agreement only between owners and employees of the same company does not constitute a conspiracy.

Evidence that the defendants and alleged coconspirators actually competed with each other has been admitted to assist you in deciding whether they actually entered into an agreement to rig bids. If the conspiracy charged in the indictment is proved, it is no defense that the conspirators actually competed with each other in some manner or that they did not conspire to eliminate all competition. Nor is it a defense that the conspirators did not attempt to collude with all of their competitors. Similarly, the conspiracy is unlawful even if it did not extend to all properties sold at the auctions during

the conspiracy period. A single conspiracy may involve several subagreements or subgroups of conspirators.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators.

On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, or merely by knowing that a conspiracy exists.

INSTRUCTION NO. 22

CONSPIRACY – KNOWLEDGE OF AND ASSOCIATION WITH OTHER CONSPIRATORS

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities, or locations of all of the other members.

Even though a defendant did not directly conspire with other conspirators in the overall scheme, the defendant has, in effect, agreed to participate in the conspiracy if the government proves each of the following beyond a reasonable doubt that:

(1) the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy;

(2) the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly conspired; and

(3) the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is not a defense that a person's participation in a conspiracy was minor or for a short period of time.

INSTRUCTION NO. 23

MULTIPLE CONSPIRACIES

You must unanimously decide whether the specific conspiracy charged in each count of the indictment existed and, if so, who at least some of its members were. If you find that the conspiracy charged in that count did not exist, then you must return a not guilty verdict on that count, even though you may find that some other conspiracy or conspiracies existed. Similarly, if you find that any defendant was not a member of the conspiracy charged in that count, then you must find that defendant not guilty on that count, even though that defendant may have been a member of some other conspiracy or conspiracies.

INSTRUCTION NO. 24

INTERSTATE COMMERCE

The third element of a bid-rigging offense is that the bid-rigging conspiracy must involve interstate commerce. The government must prove beyond a reasonable doubt that the conspiracy charged in the indictment occurred in the flow of interstate commerce.

Funds in interstate commerce are considered in commerce until they reach the point where their movement is intended to end. A temporary pause in their transit does not necessarily mean that the funds are no longer in commerce – where there is a practical continuity of movement, funds remain in commerce until they reach their final destination.

While real estate remains physically in one state, transactions related to real estate can be in the flow of interstate commerce. To decide whether the charged conspiracy was "in the flow" of interstate commerce, you must determine whether the activities of the charged conspiracy were an essential part of a real estate transaction across state lines. When the alleged conspiracy occurs within the flow of interstate commerce, the magnitude of the commerce restrained is unimportant. If you find that the rigged foreclosure sales at the Alameda County (for Count One) or Contra Costa County (for Count Six) real estate auctions were an essential part of interstate foreclosure transactions involving the transfer of funds from the State of California to entities in other states, then the conspiracy is in the flow of interstate commerce and therefore the interstate commerce element is proven for that bid-rigging count.

Although the government must prove beyond a reasonable doubt that the conspiracy charged in the indictment occurred within the flow of interstate commerce, the government's proof need not quantify or value any adverse impact of the charged conspiracy or show that the charged conspiracy had any anticompetitive effect.

Proof of interstate commerce as to one defendant or coconspirator in the charged conspiracy satisfies the interstate commerce element as to every defendant in the charged conspiracy.

INSTRUCTION NO. 25

KNOWINGLY

An act is done knowingly if a defendant is aware of the act and does not act, or fail to act, through ignorance, mistake, or accident. The government is not required to prove that a defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

INSTRUCTION NO. 26

STATUTE OF LIMITATIONS

The indictment charges that the conspiracy alleged in Count One began at least as early as June 2008 and continued until at least January 2011, and that the conspiracy alleged in Count Six began at least as early as July 2008 and continued until at least January 2011.

The grand jury returned its indictment of the defendants on November 19, 2014. There is a five-year statute of limitations which applies to the offenses charged here. This means that the defendants cannot be found guilty on a count unless you find beyond a reasonable doubt that the conspiracy charged in that count existed at some time within the period of the statute of limitations, which, for purposes of this case, is the period beginning November 19, 2009, and continuing until November 19, 2014.

INSTRUCTION NO. 27

VENUE

Before you can find any defendant guilty of committing the crime charged in Count One, you must find by a preponderance of the evidence that, during the period from about June 2008 to on or about January 2011, some act in furtherance of the bid-rigging conspiracy charged in Count One occurred in the Northern District of California.

Before you can find any defendant guilty of committing the crime charged in Count Six, you must find by a preponderance of the evidence that, during the period from about July 2008 to on or about January 2011, some act in furtherance of the bid-rigging conspiracy charged in Count Six occurred in the Northern District of California.

The district includes Alameda County and Contra Costa County.

To prove something by a preponderance of the evidence is to prove it is more likely true than not true. This is a lesser standard than "beyond a reasonable doubt."

INSTRUCTION NO. 28

CHARGES AGAINST DEFENDANT NOT EVIDENCE – PRESUMPTION OF INNOCENCE – BURDEN OF PROOF

The indictment is not evidence. The defendants have pleaded not guilty to the charges. The defendants are presumed to be innocent unless and until the government proves the defendants guilty beyond a reasonable doubt. In addition, the defendants do not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charges beyond a reasonable doubt.

INSTRUCTION NO. 29

DEFENDANT'S DECISION NOT TO TESTIFY

A defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that a defendant did not testify.

INSTRUCTION NO. 30

DEFENDANT'S DECISION TO TESTIFY

Defendant Gregory Casorso has testified. You should treat this testimony just as you would the testimony of any other witness.

INSTRUCTION NO. 31

REASONABLE DOUBT - DEFINED

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that a defendant is guilty, it is your duty to find that defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that a defendant is guilty, it is your duty to find that defendant guilty.

INSTRUCTION NO. 32

WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

(1) the sworn testimony of any witness;

(2) the exhibits received in evidence; and

(3) any facts to which the parties have agreed.

INSTRUCTION NO. 33

WHAT IS NOT EVIDENCE

In reaching your verdict you may consider only the testimony and exhibits received in evidence. The following things are not evidence and you may not consider them in deciding what the facts are:

1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence. In addition, some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence in a limited way, you must do so.

3. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

INSTRUCTION NO. 34

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which you can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

INSTRUCTION NO. 35

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

INSTRUCTION NO. 36

ACTIVITIES NOT CHARGED

You are here only to determine whether each defendant is guilty or not guilty of the charges in the indictment. The defendants are not on trial for any conduct or offense not charged in the indictment.

INSTRUCTION NO. 37

SEPARATE CONSIDERATION OF MULTIPLE COUNTS – MULTIPLE DEFENDANTS

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

All the instructions apply to each defendant and to each count unless a specific instruction states that it applies only to a specific defendant or count.

There are three defendants in this case: Michael Marr, Javier Sanchez, and Gregory Casorso. The charges brought against the defendants relate to their alleged activity at foreclosure auctions in Alameda County and Contra Costa County.

Alameda County

All three defendants are charged in Count One with a conspiracy in violation of the Sherman Antitrust Act, Section 1 of Title 15 of the United States Code, at the foreclosure auctions in Alameda County.

Contra Costa County

Defendants Mike Marr and Javier Sanchez alone are charged in Count Six with a conspiracy in violation of the Sherman Antitrust Act, Section 1 of Title 15 of the United States Code, at the foreclosure auctions in Contra Costa County.

INSTRUCTION NO. 38

"ON OR ABOUT" DEFINED

The indictment charges that the offenses were committed "on or about" a certain date. Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the dates alleged in the indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

INSTRUCTION NO. 39-A

PARTICIPATION IN "ROUNDS"

You have heard evidence that certain defendants participated in "rounds" following the public auction. If you find that rounds were in furtherance of the bid-rigging conspiracy alleged in the indictment, then you may consider defendants' participation in rounds as evidence of their participation in that bid-rigging conspiracy. If, on the other hand, you do not find that rounds were in furtherance of the bid-rigging conspiracy alleged in the indictment, then defendants' participation in rounds alone does not violate the Sherman Act.

INSTRUCTION NO. 40

TESTIMONY OF WITNESSES INVOLVING SPECIAL CIRCUMSTANCES – IMMUNITY, BENEFITS, ACCOMPLICE, PLEA

You have heard testimony from government witnesses Wesley Barta, Doug Ditmer, Danli Liu, Chuck Rock, and Brad Roemer, who have pleaded guilty to a crime arising out of the same events for which the defendants are on trial and who testified pursuant to a cooperation agreement. These guilty pleas are not evidence against the defendant, and you may consider it only in determining these witnesses' believability.

For this reason, in evaluating the testimony of each of these witnesses, you should consider the extent to which or whether his or her testimony may have been influenced by this factor. In addition, you should examine his testimony with greater caution than that of other witnesses.

INSTRUCTION NO. 41

PLEA AGREEMENTS

You've heard about the guilty pleas of the alleged coconspirators of the defendants. The fact that a witness entered a plea of guilty to the offense charged is not evidence of guilt of any person, including the defendants. You may consider it only in determining the witness's believability.

INSTRUCTION NO. 42

DISPOSITION OF CHARGES AGAINST COCONSPIRATORS

For reasons that do not concern you, the case against several alleged coconspirators of the defendants is not before you. Do not speculate why. That fact should not influence your verdicts with respect to the defendants, and you must base your verdict solely on the evidence against the defendants.

INSTRUCTION NO. 43

CHARTS AND SUMMARIES IN EVIDENCE

Certain charts and summaries have been admitted in evidence. Charts and summaries are only as good as the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

INSTRUCTION NO. 44

CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE

During the trial, certain charts and summaries were shown to you in order to help explain the evidence in the case. These charts and summaries were not admitted in evidence and will not go into the jury room with you. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Certain charts and summaries have been shown to you in order to help you understand the facts disclosed by the books, records and other documents which are in evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in this case you should disregard these charts and summaries and determine the facts from the underlying evidence.

INSTRUCTION NO. 45

DUTY TO DELIBERATE

When you begin your deliberations, elect one member of the jury as your foreperson who will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

INSTRUCTION NO. 46

CONSIDERATION OF EVIDENCE – CONDUCT OF THE JURY

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings. If any juror is exposed to any outside information, please notify the court immediately.

INSTRUCTION NO. 47

USE OF NOTES

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

INSTRUCTION NO. 48

JURY CONSIDERATON OF PUNISHMENT

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

INSTRUCTION NO. 49

VERDICT FORMS

A verdict form has been prepared for you. [Explain verdict forms as needed.] After you have reached unanimous agreement on a verdict, your foreperson should complete the verdict form according to your deliberations, sign and date it, and advise the [clerk] [Court Security Officer] that you are ready to return to the courtroom.

INSTRUCTION NO. 50

COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the [clerk] [Court Security Officer], signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone, including me, how the jury stands, numerically or otherwise, on any question submitted to you, including the question of the guilt of the defendant, until after you have reached a unanimous verdict or have been discharged.

More *Beaver* Materials

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	FILED: APRIL 11, 2006
v.	)	Cause No. IP 06- 61 -CR-01 M/F
MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS, CORP.; CHRIS A. BEAVER; RICKY J. BEAVER a/k/a RICK BEAVER; and JOHN J. BLATZHEIM, Defendants.	)	-02 -03 -04

INDICTMENT

COUNT ONE – SHERMAN ACT CONSPIRACY
(15 U.S.C. § 1)

The Grand Jury charges that:

I.

DESCRIPTION OF THE OFFENSE

1. The following corporations and individuals are hereby indicted and made defendants on the charge stated below:

A. MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS, CORP.;

B. CHRIS A. BEAVER;

C. RICKY J. BEAVER a/k/a RICK BEAVER; and

D. JOHN J. BLATZHEIM.

2. Beginning at least as early as July, 2000 and continuing until May 25, 2004, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators Irving Materials, Inc., Builder's Concrete and Supply Co., Inc. and other corporations and individuals entered into

and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the prices at which ready mixed concrete was sold in the Indianapolis, Indiana metropolitan area. Defendant JOHN J. BLATZHEIM joined the conspiracy in or about April, 2003. The combination and conspiracy engaged in by the defendants and their co-conspirators was in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

3. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and their co-conspirators, the substantial terms of which were to fix and maintain the prices at which ready mixed concrete was sold in the Indianapolis, Indiana metropolitan area.

II.

MEANS AND METHODS OF THE CONSPIRACY

4. For the purpose of forming and carrying out the charged combination and conspiracy, the defendants and their co-conspirators did those things that they combined and conspired to do, including, among other things:

A. attending and participating in meetings among competing ready mixed concrete producers to discuss the prices at which ready mixed concrete was sold in the Indianapolis, Indiana, metropolitan market. These meetings were held at various locations, including, but not limited to, a horse barn owned by a co-conspirator, Gus B. Nuckols III a/k/a Butch Nuckols, president of Builder's Concrete and Supply Co., Inc.;

B. agreeing during those meetings and discussions to increase prices of ready mixed

concrete to be sold in the Indianapolis, Indiana, metropolitan market;

C. agreeing during those meetings and discussions to limit or eliminate discounts and implement surcharges applied to ready mixed concrete sold in the Indianapolis, Indiana, metropolitan market;

D. issuing price announcements and prices quotations in accordance with the agreements reached;

E. selling ready mixed concrete pursuant to those agreements at collusive and noncompetitive prices;

F. accepting payment for ready mixed concrete sold at the agreed upon collusive and noncompetitive prices;

G. contacting co-conspirators to discuss the price of ready mixed concrete sold by co-conspirators for the purpose of monitoring and enforcing adherence to the price agreements;

H. attempting to conceal the conspiracy and conspiratorial contacts through various means.

III.

DEFENDANTS AND CO-CONSPIRATORS

5. MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS, Corp. ("BEAVER"), is an Indiana corporation with its headquarters in Noblesville, Indiana. During the period covered by this Count, BEAVER was engaged in the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana, metropolitan area and elsewhere.

6. During the period covered by this Count, defendant CHRIS A. BEAVER was the Operations Manager for defendant BEAVER.

7. During the period covered by this Count, defendant RICKY J. BEAVER a/k/a RICK BEAVER was the Commercial Sales Manager for defendant BEAVER.

8. Beginning in or about April, 2003, through the end of the period covered by this Count, defendant JOHN J. BLATZHEIM was the Executive Vice-President of Builder's Concrete and Supply Co., Inc., a corporate co-conspirator.

9. Various co-conspirators, not made defendants in this Count, participated in the offense charged in this Count and performed acts and made statements in furtherance of the charged offense.

10. Whenever in this Count reference is made to any act, deed, or transaction of any corporation, such allegation shall be deemed to mean that the corporation engaged in such act, deed, or transaction by or through its officers, directors, agents, employees, or representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

IV.

TRADE AND COMMERCE

11. Ready mixed concrete is a product whose ingredients include cement, aggregate (sand and gravel), water, and, at times, other additives. Ready mixed concrete is made on demand and, if necessary, is shipped to work sites by concrete mixer trucks. Ready mixed concrete is purchased by do-it yourself and commercial customers, as well as local, state, and federal governments for use in various construction projects, including, but not limited to, sidewalks, driveways, bridges, tunnels, and roads.

12. During the time period covered by this Count, the corporate conspirators purchased substantial quantities of equipment and supplies necessary to the production and distribution of

ready mixed concrete, which equipment and supplies were shipped into Indiana from points of origin outside Indiana.

13. During the period covered by this Count, the activities of the defendants and co-conspirators that are the subject of this Count were within the flow of, and substantially affected, interstate trade and commerce.

V.

JURISDICTION AND VENUE

14. The combination and conspiracy charged in this Count was carried out, in part, in the Southern District of Indiana within the five years preceding the return of this Count.

ALL IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1.

COUNT TWO – FALSE STATEMENT
(18 U.S.C. § 1001)

The Grand Jury charges that:

1. JOHN J. BLATZHEIM is hereby indicted and made a defendant on the charge stated below.

2. Beginning in or about April, 2003, through at least May 25, 2004, defendant JOHN J. BLATZHEIM was the Executive Vice-President of Builder's Concrete and Supply Co., Inc.

3. In October, 2003, JOHN J. BLATZHEIM attended a meeting at a horse barn which was owned by Gus B. Nuckols III a/k/a Butch Nuckols, president of Builder's Concrete and Supply Co., Inc. That meeting was attended by representatives of Irving Materials, Inc., Builder's Concrete and Supply Co., Inc. and other corporate co-conspirators in the conspiracy which is the subject of Count One of this Indictment. During that meeting, and while JOHN J. BLATZHEIM was present, the coconspirators agreed to fix the price of ready mixed concrete sold in the Indianapolis, Indiana metropolitan area. At various other times between April, 2003 and May

25, 2004, JOHN J. BLATZHEIM participated in discussions about prices or discount amounts of ready mixed concrete with representatives of other corporate co-conspirators in the conspiracy which is the subject of Count One of this Indictment.

4. On May 25, 2004, in the Southern District of Indiana, defendant JOHN J. BLATZHEIM knowingly and willfully made a false statement which was material to a matter within the jurisdiction of the executive branch of the Government of the United States. Specifically, in connection with an investigation by the Midwest Field Office of the Antitrust Division, United States Department of Justice ("Antitrust Division"), JOHN J. BLATZHEIM was interviewed by agents of the Antitrust Division and the Federal Bureau of Investigation. During that interview, JOHN J. BLATZHEIM falsely stated that he was unaware of any representative of a ready mixed concrete company being involved in pricing discussions with competitors.

ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 1001.

COUNT THREE – FALSE STATEMENT
(18 U.S.C. § 1001)

The Grand Jury charges that:

1. CHRIS A. BEAVER is hereby indicted and made a defendant on the charge stated below.

2. From at least as early as July, 2000 through at least May 25, 2004, defendant CHRIS A. BEAVER was the Operations Manager for MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS, Corp.

3. In October, 2003, CHRIS A. BEAVER attended a meeting at a horse barn which was owned by Gus B. Nuckols III a/k/a Butch Nuckols, president of Builder's Concrete and Supply Co., Inc. That meeting was attended by representatives of Irving Materials, Inc., Builder's

Concrete and Supply Co., Inc. and other corporate co-conspirators in the conspiracy which is the subject of Count One of this Indictment. During that meeting, and while CHRIS A. BEAVER was present, the coconspirators agreed to fix the price of ready mixed concrete sold in the Indianapolis, Indiana metropolitan area. At various other times between July, 2000 and May 25, 2004, CHRIS A. BEAVER participated in discussions about prices or discount amounts of ready mixed concrete with representatives of other corporate co-conspirators in the conspiracy which is the subject of Count One of this Indictment.

4. On May 25, 2004, in the Southern District of Indiana, defendant CHRIS A. BEAVER knowingly and willfully made a false statement which was material to a matter within the jurisdiction of the executive branch of the Government of the United States. Specifically, in connection with an investigation by the Midwest Field Office of the Antitrust Division, United States Department of Justice, CHRIS A. BEAVER was interviewed by agents of the Federal Bureau of Investigation and the Indiana State Police. During that interview, CHRIS A. BEAVER falsely stated that he was unaware of any representative of a ready mixed concrete company being involved in pricing discussions with competitors.

ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 1001.

COUNT FOUR – FALSE STATEMENT
(18 U.S.C. § 1001)

The Grand Jury charges that:

1. RICKY J. BEAVER a/k/a RICK BEAVER is hereby indicted and made a defendant on the charge stated below.

2. From at least as early as July, 2000 through at least May 25, 2004, defendant RICKY J.

BEAVER a/k/a RICK BEAVER was the Commercial Sales Manager for MA-RI-AL CORPORATION, d/b/a BEAVER MATERIALS, Corp.

3. Between late 2002 and early 2003, RICKY J. BEAVER a/k/a RICK BEAVER attended a meeting at an Indianapolis-area hotel. That meeting was attended by representatives of Irving Materials, Inc., Builder's Concrete and Supply Co., Inc., and other corporate co-conspirators in the conspiracy which is the subject of Count One of this Indictment. During that meeting, and while RICKY J. BEAVER a/k/a RICK BEAVER was present, the coconspirators agreed to fix the price of ready mixed concrete sold in the Indianapolis, Indiana metropolitan area. At various other times between July, 2000 and May 25, 2004, RICKY J. BEAVER a/k/a RICK BEAVER participated in discussions about prices or discount amounts of ready mixed concrete with representatives of other corporate co-conspirators in the conspiracy which is the subject of Count One of this Indictment.

4. On May 25, 2004, in the Southern District of Indiana, defendant RICKY J. BEAVER a/k/a RICK BEAVER knowingly and willfully made a false statement which was material to a matter within the jurisdiction of the executive branch of the Government of the United States. Specifically, in connection with an investigation by the Midwest Field Office of the Antitrust Division, United States Department of Justice, RICKY J. BEAVER a/k/a RICK BEAVER was interviewed by agents of the Federal Bureau of Investigation and the Indiana State Police. During that interview, RICKY J. BEAVER a/k/a RICK BEAVER falsely stated that he was unaware of any representative of a ready mixed concrete company being involved in pricing discussions with competitors.

ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 1001.

Dated: April 11, 2006

A TRUE BILL

/s/
FOREPERSON

/s/
THOMAS O. BARNETT
Assistant Attorney General

/s/
MARVIN N. PRICE, JR.
Chief, Midwest Field Office

/s/
SCOTT D. HAMMOND
Deputy Assistant Attorney General

/s/
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	IP 06-CR-0061 -01 M/F -02 -03
MA-RI-AL CORPORATION,d/b/a BEAVER MATERIALS, CORP.; CHRIS A. BEAVER; and RICKY J. BEAVER a/k/a RICK BEAVER, Defendants.	)	

VERDICT FOR COUNT ONE

As to the crime of conspiracy to to suppress and eliminate competition by fixing the prices at which ready mixed concrete was sold in the Indianapolis, Indiana, metropolitan area, in violation of Title 15, United States Code, Section 1, as charged in Count One of the Indictment, we, the Jury, find the defendant:

Ma-Ri-Al Corporation,
d/b/ Beaver Materials Corp.

Not Guilty ____ Guilty X

Chris A Beaver

Not Guilty ____ Guilty X

Ricky J. Beaver a/k/a Rick Beaver

Not Guilty ____ Guilty X

[redacted]
FOREPERSON

11/16/06
Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MA-RI-AL CORPORATION,d/b/a BEAVER MATERIALS, CORP.; CHRIS A. BEAVER; and RICKY J. BEAVER a/k/a RICK BEAVER, Defendants.	)	IP 06-CR-0061 -01 M/F -02 -03

VERDICT FOR COUNT THREE

As to the crime of making a false statement, in violation of Title 18,Section 1001, we, the Jury, find the defendant:

Chris A Beaver

Not Guilty	Guilty
	X

[redacted]
FOREPERSON

11/16/06
Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	IP 06-CR-0061 -01 M/F
	)	-02
MA-RI-AL CORPORATION,d/b/a BEAVER MATERIALS, CORP.;	)	-03
CHRIS A. BEAVER; and	)	
RICKY J. BEAVER a/k/a RICK BEAVER, Defendants.	)	

VERDICT FOR COUNT FOUR

As to the crime of making a false statement, in violation of Title 18,Section 1001, we, the Jury, find the defendant:

Ricky J. Beaver a/k/a Rick Beaver

Not Guilty _____ Guilty X

[redacted]
FOREPERSON

11/16/06
Date

UNITED STATES DISTRICT COURT

SOUTHERN District of **INDIANA**

UNITED STATES OF AMERICA
V.
CHRIS A. BEAVER

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:06CR00061-002

USM Number: 08207-028

Jeffrey Lockwood
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

X was found guilty on count(s) 1 and 3
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count(s)
15 U.S.C. § 1	Sherman Antitrust Act Violation	5/25/04	1
18 U.S.C. § 1001	Making False Statements	5/25/04	3

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

2/9/2007
Date of Imposition of Judgment

Signature of Judicial Officer

Honorable Larry J. McKinney, Chief U.S. District Court Judge
Name and Title of Judicial Officer

2/20/07
Date

DEFENDANT: CHRIS A. BEAVER
CASE NUMBER: 1:06CR00061-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 27 months, each count, concurrent

X The court makes the following recommendations to the Bureau of Prisons:
That the defendant be designated to a minimum security facility, specifically, to the federal prison camp in Terre Haute, Indiana.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

X as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CHRIS A. BEAVER
CASE NUMBER: 1:06CR00061-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 2 years

Count 1 - 1 year; Count 3 - 2 years, concurrent

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CHRIS A. BEAVER
CASE NUMBER: 1:06CR00061-002

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall pay any fine that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release.

2. The defendant shall provide the probation officer access to any requested financial information while any remaining fine balance is owed.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

_____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

DEFENDANT: CHRIS A. BEAVER
CASE NUMBER: 1:06CR00061-002

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$ 5,000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ _____	$ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

The defendant shall pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

X The court determined that the defendant does not have the ability to pay interest and it is ordered that:

X the interest requirement is waived for the X fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: CHRIS A. BEAVER
CASE NUMBER: 1:06CR00061-002

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B **X** Payment to begin immediately (may be combined with ☐ C, ☐ D, or **X** F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F **X** Special instructions regarding the payment of criminal monetary penalties:

Fine shall be paid within 90 days of sentencing.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Defendant Name	Case Number	Joint & Several Amount

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Appeal

APPEALS IN CRIMINAL CASES

28 U.S.C § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title

Rule 3 of the Federal Rules of Appellate Procedure: Appeal as of Right

(a) *Filing the Notice of Appeal*.
  (1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).
  (2) – (4) *Omitted*

(b) *Joint or Consolidated Appeals*. [*Omitted*]

(c) *Contents of the Notice of Appeal*.
  (1) The notice of appeal must:
    (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";
    (B) designate the judgment, order, or part thereof being appealed; and
    (C) name the court to which the appeal is taken.

[*Remainder of rule omitted*]

Rule 4 of the Federal Rules of Appellate Procedure: Appeal as of Right

. . .

(b) *Appeal in a Criminal Case*.
  (1) *Time for Filing a Notice of Appeal.*
    (A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:
      (i) the entry of either the judgment or the order being appealed; or
      (ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:
(i) the entry of the judgment or order being appealed; or
(ii) the filing of a notice of appeal by any defendant.

. . .

FILED
U.S. DISTRICT COURT
INDIANAPOLIS DIVISION
07 FEB 20 PM 4:26
SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	
Vs.	)	IP 06-CR-61-02-M/F
CHRIS A. BEAVER, Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Chris A. Beaver, defendant in the above named case, hereby appeals to the United States Court of Appeals for the 7th Circuit from the final judgment of conviction and sentencing entered in this action on the 9th day of February, 2007.

Jeffrey A. Lockwood
Attorney for Chris A. Beaver

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon Frank Vondrak, Assistant United States Attorney, U.S. Department of Justice, Anti-Trust Division, Rookery Building, 209 South LaSalle Street, Suite 600, Chicago, IL 60604 and James Voyles at One Virginia Ave., Suite 700, Indianapolis, IN 46204, on or before the date of filing.

Jeffrey A. Lockwood

Prepared by:
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APPEAL OF A SENTENCE

18 U.S.C. § 3742. Review of a Sentence

(a) *Appeal by a Defendant*. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) *Appeal by the Government*. The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) *Plea Agreements*. In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) *Record on Review*. If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;
(2) the presentence report; and
(3) the information submitted during the sentencing proceeding.

(e) *Consideration*. Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;
(2) was imposed as a result of an incorrect application of the sentencing guidelines;
(3) is outside the applicable guideline range, and
  (A) the district court failed to provide the written statement of reasons required by section 3553(c);
  (B) the sentence departs from the applicable guideline range based on a factor that—
    (i) does not advance the objectives set forth in section 3553(a)(2); or
    (ii) is not authorized under section 3553 (b); or
    (iii) is not justified by the facts of the case; or
  (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553 (a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553 (c); or
(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) *Decision and Disposition.* If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence

was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) *Sentencing Upon Remand*. A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994 (a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553 (c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) *Application to a Sentence by a Magistrate Judge*. An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) *Guideline Not Expressed as a Range*. For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions. For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553 (a)(2); and

(B) is authorized under section 3553 (b); and
(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).